UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Fair Isaac Corporation and myFICO Consumer Services, Inc., Plaintiffs, vs. Experian Information Solutions, Inc.; TransUnion, LLC; VantageScore Solutions, LLC; and Does I through X, Defendants.	)	CIVIL ACTION NO. 06-4112 (ADM/JSM) **Volume XV** Courtroom 13 West Thursday, November 19, 2009 Minneapolis, Minnesota

J U R Y T R I A L P R O C E E D I N G S

BEFORE THE HONORABLE ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE
AND A JURY

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(8:45 a.m.)

P R O C E E D I N G S

IN OPEN COURT

(Without the jury)

THE COURT: Okay. The record should reflect we are outside the presence of the jury and I think there are a few cleanup items we need to deal with prior to the arrival of the jury.

My understanding is that after some discussion between the parties, the demonstrative exhibits issues that remain for the Court's decision related to Exhibits 501 and 505 and 506. 501 and 505 will go to the jury. They were received in evidence and have been seen by the jury.

With regard to 506 -- hard for me to read these numbers -- 506 or --

Is that a 6, John? -- the Berger slides --

THE CLERK: 305.

THE COURT: Oh, 305. Little dyslexia this morning. 305, the Berger survey and opinions, I have pulled out the ones -- I got a copy of the transcript, and even though the transcript doesn't gear it to slides, I tried to follow through as to which ones were displayed and was guided by your notes as well with regard to the items that you agreed were not displayed. But the packet that'll go to the jury from the Berger -- from the Jacoby slides evaluating Berger's

survey and opinions are pages 1 through 27, 31 through 34, 39 through 41, and 44 through 46, and the rest have been taken out of the packet as not displayed or whatever, so it's a smaller packet.

Everybody got that or do you want me to run through that again? Okay. Everybody seems to be on track with that.

All right. John has given you the final set of instructions. Changes from the last packet you saw related to -- I caught last night that the instructions didn't track the exact order of the special verdict form, so the one relating to Question 7 is moved so that we go through the -- consecutively through the verdict form, so it's just a change in order of the number. And I changed the verbiage a little bit to the first damages instruction will be when I tell them about Question Number 8 so there's a little transition in there.

And then so that my children wouldn't be embarrassed by my instructions, I changed the fact that they watched on a "television set" to "monitor," because that would really bother them if I --

(Laughter)

Things like that, they tell me how old I'm getting. So it would be a monitor when we talk about videotape depositions, they saw it on a monitor rather than a television set.

All right. And I don't think that would engender any further objections as they're all nonsubstantive matters.

Mr. Larus, it does.

MR. LARUS: Well, I'd just like to preserve our objection for the record, because I don't know that it was made of record, our objection to Exhibits EX 501 and EX 505 going to the jury. We understand your Honor's ruling. We just want to preserve the objection.

THE COURT: Yes. That's noted. Did anyone wish to argue about the Jacoby slides any more, the ones I -- you can live with what we left in there?

Okay. Very good. We will start then -- and Mr. Milne, you may set up at the lectern so that when the jury next arrives at 9 -- Mr. Glancy?

MR. GLANCY: Your Honor, we had just one question or comment about the verdict form, that we had requested and I don't think you ruled yesterday either way that the first several instructions refer the jury to Question 9 if they answer in a way that would otherwise end the case.

Question 9 is the instruction on fraud on the Trademark Office and we think that that question should be answered regardless of the secondary meaning because it goes to our claim for attorneys' fees in this case and it also is something that we would forward to the Trademark Office.

THE COURT: All right.

MR. GLANCY: And there's a pending cancellation proceeding on that same ground in the Trademark Office.

THE COURT: All right. Plaintiff contest whether or not they should answer the final question with regard to the fraud on the Trademark Office regardless of their answers to the prior questions?

MR. LARUS: We believe the way it's currently structured is how we suggest it be handled whether or not it relates to some other potential proceeding.

THE COURT: Well, it seems to me it's safer to have them answer that because then we'd at least know. Whether they should or not we can figure out later, but if we don't have their answer, then we don't know it.

John, we can fix the signals on that pretty easily, can't we, just: Regardless of your answer to Question Number 1, instead of saying you're done, say go to Question 9?

MR. SCHUTZ: Well, I don't think it would say quite that.

THE COURT: We'll work on the language and we'll give you the special verdict form to look at. We can work on that through the morning while you're arguing. You'll get another chance to look at that before we do it.

All right. And I want to forewarn you that I do tell the jury that they may not take notes during closing

arguments because that's not evidence, so I will not let them have their notebooks during argument.

MR. REMELE: You don't give them the special verdict form when we're arguing?

THE COURT: I don't. I don't. You can use it, you can put it on the screen, though it might change a little bit in terms of the signals, so you might want to just go with the questions rather than the signals. The questions will be the same. And then I do display it on the ELMO as I'm reading it to them in my instructions.

All right. We're set for 9 o'clock?

All right. Court will be in recess till 9.

(Recess taken at 8:53 a.m.)

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(9:00 a.m.)

IN OPEN COURT

(Jury enters)

THE COURT: Good morning. Please be seated.

As I told you Tuesday when we last were in session, that the matters remaining to be accomplished prior to your deliberations are the arguments of counsel and my instructions of law to you. We're going to proceed with those matters today.

Because the arguments of the lawyers are not evidence in the case, I'm going to ask you not to take notes

during the argument, just listen to their arguments, and later on I'll be giving you instructions and those will be in writing and I'm going to give you a copy of the instructions.

So you don't really need to take any notes today at all. Devote your full attention to listening to the arguments, please.

We will begin first with the argument given on behalf of defendant Experian by their counsel, Mr. Robert Milne.

Mr. Milne, you may proceed.

MR. MILNE: Thank you, your Honor.

DEFENDANT EXPERIAN INFORMATION SOLUTIONS, INC.'s CLOSING ARGUMENT

MR. MILNE: Good morning, everyone. It's really my pleasure finally at the end of this long, long, long trial to be able to address you at closing.

And I want to begin by thanking you, really thanking you for your attention over this trial. I know it has been a long trial and I know this isn't exactly the most interesting subject matter in the world, it's difficult stuff, and the attention that you all have paid and your ability to stay awake through it all has really been impressive.

(Laughter)

MR. MILNE: I appreciate that. You know, and our

system really places great reliance on jurors like you to do that, to pay attention when the evidence is coming in in a trial and to then use your common sense, your good judgment, et cetera, and take that evidence and apply it to the dispute and come to the right result, and judging how well you paid attention, I know you're going to do a great job at that.

And what I'd like to do in my closing is to work through some of the evidence with you now in the context of the specific -- you know, the legal requirements of these claims and talk through with you what the evidence is on each of those, and I'm hoping that that will help make your job a little easier when you go back to deliberate.

Now, as you've heard from the judge, you're going to get some instructions from her on the law at the end of the case. And I want to just make clear at the beginning here, because you've heard about some other matters during the course of this trial, things like keyword Internet advertising and the like, you are not going to have to worry about those issues. You're not going to be asked to make any decisions about those issues and the judge will instruct you about that. There are only two issues that you're going to have to decide in your deliberations.

The first is, you're going to have to decide on this claim of infringement of the claimed 300 to 850 trademark, that's number one, and number two, you're going to

have to decide on this issue of the defendants' claim of whether Fair Isaac committed fraud, basically lied to the Patent and Trademark Office when it was going through that application on the 300 to 850 patent -- trademark. I'm sorry.

So those are the two issues and what I'd like to -- Mr. Remele from TransUnion is going to focus on the fraud claims when he speaks to you and so I'm going to basically be focusing on this 300 to 850 trademark claim.

And as I know you're all painfully aware by this point, Fair Isaac claims a trademark in (indicating) this, 300-850, and as a practical matter on every number in between 300 and 850, because they take the position that any scoring service that has a range that overlaps even just a little bit with 300 to 850 infringes their trademark.

And so the first issue that you're going to have to decide is, is this thing 300 to 850 a valid trademark, because if it's not a valid trademark, there's nothing to infringe and the case is over, this 300 to 850 case is over.

And you heard a little bit in the testimony the other day from Mr. Anderson, the former Trademark Office official, that 300 to 850 is just a descriptive term, and you'll hear that Judge Montgomery has already decided that that's what 300 to 850 is. It merely describes something about Fair Isaac's scoring algorithm, the FICO algorithm. So

what that means is that when it comes to validity of 300 to 850, the only thing that you have to decide is whether 300 to 850 has acquired secondary meaning. You've heard that term a few times over the course of the trial.

And what secondary meaning means, what it's referring to in the context of 300 to 850 is, it's saying that -- and you have to find as a result of the evidence -- that a significant portion of the millions of consumers for credit scoring services, when they hear 300-850, they have an automatic thought, an automatic association between that term and a single source, Fair Isaac. That is the essence of secondary meaning. It's like the trademarks we know about. You see the Nike swoosh and you think about a particular shoe company and we talked about that during the opening statements. That's what secondary meaning is.

Now, there's another thing that you have to keep in mind and it's very important as well. Not only does Fair Isaac have to show that secondary meaning in 300 to 850 came into existence, but it also has to show that it came into existence before my client, Experian, began selling its scoring product, the PLUS score, with the alleged infringing score range, so there's a timing element as well on what they have to prove.

I just put this little timeline up here. You've heard the evidence about how the PLUS score from Experian was

introduced in October of 2003 with a 300 to 900 scoring range, and then not too long after that they shifted that range to 330 to 830 and then that was rolled out over time across various websites into the middle part of 2004. So if you're being conservative, you could say that Fair Isaac has to show secondary meaning kicked in, if you will, by about the middle part of 2004, so it's secondary meaning by mid-2004.

And you're going to get -- at the end of the instructions from Judge Montgomery, you're going to get a special -- it's a verdict form. It's a questionnaire that you're going to have to fill out and you'll see these questions -- I've just reproduced the first page of it here, and the first question is: "Has '300-850' acquired secondary meaning?" And if you answer that question no, you're basically done, you can stop, you don't have to fill in any more questions. But even if you find there is some secondary meaning, you have to go to Question 2, which says did it acquire secondary meaning before the defendants' allegedly infringing uses, and you have to look at the entry dates for the different scores, and as I say, Experian, we're talking basically mid-2004.

So, that's your job in the first instance is to answer those couple of questions on secondary meaning.

Now, Judge Montgomery -- we talked about what

secondary meaning is, it's that automatic association -- and in the jury instructions you're going to get from Judge Montgomery a number of factors that you can consider in thinking about secondary meaning and whether it was ever developed, and there are a number of them. And you're free to consider some of them, all of them, none of them, but in the end you have to use your good judgment and your common sense based on the evidence to decide whether 300 to 850 developed secondary meaning before mid-2004.

But it's useful to kind of walk through and I've kind of pulled out several of them and simplified them a little bit. Judge Montgomery's instructions will control, of course, but here are some of the factors that you need to consider, and what I'd like to do is walk through each of them and talk to you a little bit about what the evidence is on each of them.

And the first one is was 300 to 850 ever used as a trademark. You know, in a lot of ways that's the most important question, because if they never used it as a trademark, it -- it just doesn't make sense that it could have developed secondary meaning, so let's talk about that and let's start with just a reminder of what a trademark is.

You know, a trademark is a symbol, a term, a phrase that tells you something about the source. You see that symbol and you automatically think of a particular source.

And a trademark, in some ways you can think about a trademark, it answers the question who made this thing, who is supplying this thing. A merely descriptive term answers the question of what is it, something about this thing, and that's sometimes a useful way to think about the difference between a trademark and something that's just a merely descriptive term.

So how do you use something as a trademark? And we talked about it. And a good example to think about this is, the other day the example of Kentucky Fried Chicken came up in the questioning of Mr. Anderson. And how did Kentucky Fried Chicken, which is a descriptive term -- it says something about chicken fried using some Kentucky recipe or in Kentucky -- how did it come to be associated -- nobody thinks of it that way anymore. When we hear Kentucky Fried Chicken we think of a particular place, a particular restaurant chain. And the way it came to be -- to have that association is that the Kentucky Fried Chicken Company over years and years relentlessly advertised that name, that term. It was in TV commercials, magazines, radio, you name it. They've been promoting that term for years. That is trademark use.

We talked about American Airlines in my opening statement. It's the same thing, a descriptive term. How did it become associated with a particular airline company?

Advertisement, promotion, featuring of the thing, not just using it as a descriptive term.

So to use something as a trademark, you feature it in advertising. You use big bold lettering and you say -- in the context of, say, 300 to 850 you say: Look for your 300 to 850 score.

You look at the top of the website -- and again, we're focusing on mid-2004 and earlier -- were they using 300 to 850 that way? Did they put 300 to 850 up at the top of their websites, their brochures, their advertisements? Those are the things that you need to look at to decide whether 300 to 850 has ever been used as a trademark.

The other thing that you do when you use something really as a trademark is you put the world on notice that you're claiming it as a trademark.

Now, Fair Isaac says that it has had trademark rights in 300 to 850 going back to 2001 when they first started selling scores in the consumer marketplace. That's what they say. And so one of the questions for you is did they put the world on notice of that before they started writing letters and filing lawsuits in 2006. Did they use that TM symbol. Did they put the world on notice.

The other thing that you do when you have a real trademark is you enforce it. If you're aware of somebody using an overlapping term, something that you think is

infringing, you write letters. You go out there and you tell people, you put the world on notice: I have a trademark.

So those are the kinds of things you do when you have a real trademark and you're using it as a real trademark, and so what does the evidence show here about Fair Isaac's use of 300 to 850 before mid-2004?

Now, if you think about Fair Isaac's case, you have to go way back to the beginning of the case -- it seems like a year ago -- for their first witness, the only witness from the company that they called to sort of establish trademark rights, and that was Ms. Kramers-Dove. She testified at the beginning of the case. And as she told you and as she admitted, she's not even involved in the part of the business that sells FICO scores to consumers. She's not involved in that piece of the business.

Why did Fair Isaac not bring the person who's heading up their consumer business to talk about advertising and the kinds of things that you heard about from the people like Mr. Danaher and Mr. Williams, Mr. Danaher from TU and Mr. Williams from Experian, who came in and talked about the ways in which they promote their scores in the consumer marketplace, and it may be because Fair Isaac doesn't have much to tell us there.

So what did Ms. Kramers-Dove present? What did she present to show that Fair Isaac used 300 to 850 as a

trademark in that period before mid-2004?

Well, what she did was, Fair Isaac's lawyers walked her through a series of brochures, some press releases and some website pages, and these were all presented as examples of supposed trademark use. And I just -- you are going to have all this material back in the jury room with you. I only have a short time to speak to you, so I'm going to show you a couple of examples and I would just ask you to really carefully review this material when you go back to the jury room and see if you see anything much different.

Now, this is one of the documents that Ms. Kramers-Dove presented and this is a web page from 2002, and the first thing to focus on is are they featuring 300-850. Are they saying: "Get your 300 to 850 score up at the top"? Well, up at the top, what do we see? We see "myFICO," we see "the FICO score." We don't see "300 to 850" up there. It's not being featured. Where is the reference to 300 to 850? I'm going to blow it up here. It's sort of buried over here in a sentence, and it says: "Based on a scale of 300 to 850, there are three FICO scores." That's supposed to be trademark use according to Ms. Kramers-Dove.

Now, as I said at the beginning, one of the ways you think about a trademark is a trademark tells you something about who makes this product as opposed to something about the product. And one way to think about

whether this is trademark use of 300 to 850 is, let's just pretend that this second half of the sentence was deleted and all it said was: "Based on a scale of 300 to 850" -- or let's just say they deleted the reference to FICO. "Based on a scale of 300 to 850, there are three scores." Let's say that's what the sentence said. Would 300 to 850 tell you anything about who made this thing, who supplies this thing? That's the question you have to ask yourself. But if you took out 300 to 850, that first part of the sentence, and you just focused on the last half and it said: "There are three FICO scores," would you know who was supplying this product? FICO answers the question who made this. 300 to 850 does not answer that question. 300 to 850 is just descriptive use.

Now, you may remember just the other day before your day off Mr. Robert Anderson came in and testified. We're putting -- you get to see their pictures. Mr. Robert Anderson came in and he testified. He's the one who was the Deputy Assistant Commissioner for Trademarks at the U.S. Patent and Trademark Office for 18 years.

Now, Mr. Anderson -- and again, this is your decision whether 300 to 850 is trademark use, but you can consider Mr. Anderson's testimony. And if you recall, Mr. Anderson was asked some questions about certain articles that appeared in the application file at the Patent and Trademark Office for the 300 to 850 application and I want to

put one of those up here.

This is a web page from a San Diego real estate guide and there's a sentence in there referencing 300 to 850, and see how it's exactly the same as the sentence that Ms. Kramers-Dove put forward as an example of trademark use? Mr. Anderson was asked is the use of 300 to 850 there merely descriptive, and he said based on Trademark Office procedures and standards, yes, just descriptive. He was asked is the use of 300 to 850 trademark use, and he said no, according to Trademark Office practice and procedures. This is what Ms. Kramers-Dove is putting forward as supposed trademark use. It's exactly the same language.

Let's go to another example. Here's a brochure, another one of the ones Ms. Kramers-Dove put forward as an example of 300 to 850 being used as a trademark. This is a brochure -- again, this is the first page of it. Do we see 300 to 850 anywhere on that page? No. But we do see trademarks: myFICO, FICO, their little logo, telling you who supplies this thing. You got to go inside the brochure a little bit to see a reference to 300 to 850, and I think we're going to pull it up here. And there it is. It's kind of again buried in the text, not featured like a trademark, and it says: "Your FICO score is a snapshot of your credit bureau report at a particular point in time. It's a number between 300 and 850." You have to judge for yourself. Is

that merely descriptive reference, 300 to 850, or is it telling you who made this thing, or is the FICO reference telling you who made this thing.

Mr. Anderson was asked the other day about this article as well that was in the Trademark Office file for 300 to 850, and let's pull up the sentence he was asked about.

"What is my FICO score? It's a number from 300 to 850." It's a number between 300 and 850. And Mr. Anderson was asked those same questions about the use of 300 to 850. Is it descriptive according to Trademark Office procedures and standards? He said it was just descriptive. According to Trademark Office procedures and standards, is it trademark use? Mr. Anderson said no. Again, the decision is up to you, but you can consider that testimony.

Let me show you one more example that Ms. Kramers-Dove put up as an example of trademark use, and this is actually one that I showed you during my opening statement, if you can remember that far back, a web page from 2001. This is not even the landing page for the myFICO website. But again, what do we see? Do we see at the top "300 to 850 score," "Get your 300 to 850 score"? We see "myFICO," we see their trademarks, their source indicators, and where is 300 to 850 referenced? Let's pull it up. And it says there: "Most U.S. consumers score between 300 and 850." Now, this one isn't even telling you that that's the

exact score range. It's sort of saying that's what most consumers get.

But if you recall, Ms. Kramers-Dove was asked during her cross-examination has Fair Isaac -- does Fair Isaac have a trademark in the term "between 300 and 850"? Remember, the trademark is 300-850. She was asked do they have a trademark in the phrase "between 300 and 850," and she wasn't able to say that they do. And she was also asked does Fair Isaac have a trademark in the phrase "from 300 to 850"? Again, Fair Isaac doesn't have a trademark in that phrase "from 300 to 850." So you're going to have to be the judge whether these uses of 300 to 850 come anywhere close to amounting to trademark use, and if you find that they don't, that can be enough alone for you to find no secondary meaning.

Now, there are some other factors too. Let's go back to our -- or wait. Before we do that one, still focusing on the use of 300 to 850, I want to talk about this issue of notice, because that's another thing.

You know, one of the functions of a trademark is to put the world on notice that you're claiming trademark rights, that you're claiming to be the owner of that term in that industry, and here the evidence is really striking, it's unanimous, about the lack of notice that people in this industry had that anybody was claiming trademark rights in a

scoring range. You won't see a document inside Experian's or TransUnion's files that says: "Hey, we think there's a trademark in a score range." You heard the testimony from Mr. Oliai and Mr. Williams from Experian, and they both said they never heard of a trademark in a score range. Mr. Danaher from TransUnion said the same thing. And significantly, so did the two gentlemen who came in who aren't involved in this litigation, Mr. Wilson and Mr. Christiansen, Mr. Wilson from ChoicePoint, Mr. Christiansen with LexisNexis. Now, they're both owned by LexisNexis, but they both worked at separate companies that ended up being acquired by LexisNexis, and both of those companies had developed scoring products with ranges overlapping 300 to 850. And they came in here -- they're not parties to the case, they do business with both sides here, so they don't have a stake in the outcome, and they said they never heard of a trademark in a score range.

We didn't see any evidence of Fair Isaac writing letters, putting the world on notice: "Hey you're using an overlapping score range. Stop it. We've got a trademark." You didn't see anything like that until Fair Isaac started writing letters after -- in the middle part of 2006, even though, again, they claim trademark rights going back to 2001. Focusing on this period from mid-2004 and earlier, because again that's the period you need to focus on for

secondary meaning, again, focus on whether you see any evidence that Fair Isaac used that TM symbol to put people on notice.

Now, Fair Isaac's lawyers have made a big point out of the fact that there's no legal requirement to put the -- to use a TM symbol, and that's true, we're not debating that, but if you really want to put the world on notice that you have a trademark, that's what you do. You use that trademark symbol. And if you mess up every now and then and you don't put it in, that's not a big deal, but it's when you never use it that it's a different issue, and I would ask you again look to see before mid-2004 if you see any instances of that kind of trademark usage.

And, you know, it's especially true here the use of the trademark, because as we heard, Fair Isaac has its own manuals, its own guidelines internally that say thou shalt use the TM symbol, so they didn't use it here.

Now, Fair Isaac's lawyers have said -- and we heard this from Ms. Kramers-Dove -- that there was confusion out there because different -- the Fair Isaac name -- different companies were using different brand names to sell the FICO score. The Beacon score, the Empirica score all were FICO scores. You heard that testimony. And they said: Well, we needed to adopt a uniform number range for our score because that was going to be the way we would uniquely identify our

score because of all this confusion over the different brand names. Well, there are a couple observations I want to make on that.

The first one is, simply saying that is not an excuse for not actually using that term as a trademark, using it in that featured way that we've talked about. So simply saying yeah, I want to have a uniform indentifier doesn't mean it's a trademark, doesn't mean that secondary meaning has kicked in. You have to promote it. You have to do the things necessary to make people aware.

So, if you think about it, and again, if they really serious about using 300 to 850 as their unique indentifier, we would have seen 300 to 850 being featured, right? That's going to be the way they identify this thing, but why would they use FICO? That's the brand name that's causing confusion because people are using different names. Why do we still see FICO up there at the top of the ads and we don't see 300 to 850?

And the other thing that's interesting about that claim that they needed 300 to 850 to just make sure that everybody knew that that was that one single score -- let's put up --

This is EX 16. This is a document from Fair Isaac files, it's in evidence, and you see they reference here Classic FICO scores. The score range is 300 to 850.

Let's go to the next one. This is another page from the same document. And then they've got these -- they've got these sector scores that we've heard about. And if you recall during the cross-examination of Mr. Christiansen, Mr. Larus made a big deal out of the difference between those sector scores, the auto specific scores, the mortgage, the different sector scores and the basic FICO score.

Well, these different scores, look at the ranges. 300 to 850. So Fair Isaac is selling two different sets of scores using that score range that they're saying is going to be the unique indentifier. It just doesn't make sense. You have to use your common sense and sort of evaluate whether these explanations make any sense.

So I'm going to leave trademark use at this point, but I think you'll see that the evidence shows that Fair Isaac has certainly not before mid-2004 used 300 to 850 as a trademark.

Let's go to the second item that Judge Montgomery -- one of the factors that Judge Montgomery is going to talk to you about on secondary meaning, and this is the issue of, you know, what evidence is there about consumer association between 300 to 850 and a single source.

And I would just observe at the outset here that just -- the mere fact that Fair Isaac sells a lot of scores

-- and they certainly do, hundreds of billions of scores, they are the giant in this industry, no question, but the fact that they sell a lot of scores does not mean that on its own that consumers associate, people like you and me associate 300 to 850 with a particular source. That's not proof of that kind of association.

The most common way that you go about determining whether there is this kind of association is you do a survey. You go out and get a cross section of the population and you ask them the direct question. And Fair Isaac, they had a survey expert. That was Mr. Berger. You heard him testify. And he was the gentleman who did not use a control group, didn't use a representative sample, didn't analyze his data correctly. You may recall Professor Jacoby came in and testified in no uncertain terms what he thought of Mr. Berger's work. In the end you're going to have to judge whether Mr. Berger -- whether Mr. Berger's work was valid survey work, but right now my point is a different one.

Mr. Berger did not ask a secondary meaning question. He didn't say to his survey participants: "Do you associate 300 to 850 with any particular source?" You will not see 300 to 850 in any of the questions that Mr. Berger asked and you're going to get some of those materials that Mr. Berger discussed back to the jury room with you, and take a look. He did not ask the secondary meaning question.

The only person -- the only survey expert who came in and asked that direct question was Mr. Johnson, who did the work for the defendants. He asked about the association between 300 and 850 and Fair Isaac, and if you recall, what he found is that there is almost no association between 300 and 850 and Fair Isaac.

Now, Fair Isaac has a lot of criticisms about what Mr. Johnson did. Mr. Larus got up here and he cross-examined him for it seemed like hours, days. Anyway, they had a lot of criticisms and you're going to have to judge for yourself whether Mr. Johnson had a good rationale for the way he constructed his survey. Obviously, we think he did. But the question here is -- you know, Fair Isaac is the plaintiff here. They have the burden of proof with evidence to show secondary meaning. We don't have to show the nonexistence of secondary meaning. They have to prove it. And if they had criticisms about the kinds of questions that Mr. Johnson asked, why didn't they ask Mr. Berger to go do a survey asking the direct question and not having those kinds of concerns with it that Mr. Larus was going through with Mr. Johnson? You have to be the judge of why they didn't do that. Was it because they were afraid of what the answer would be?

You also heard from Ms. Kramers-Dove and she testified that she was not aware whether Fair Isaac had done

any kind of testing on this issue of secondary meaning before this lawsuit was filed, so there's no evidence in the record right now that anybody at Fair Isaac had any idea about whether consumers had this kind of direct association between 300 to 850 and a single source before they filed this lawsuit.

Now, you also heard testimony by videotape of Mr. Thomas Quinn of Fair Isaac, and he's -- here's his picture. He's a leader in the product management/client support group at Fair Isaac.

In addition to that video testimony that you saw, Judge Montgomery has admitted into evidence an interview -- summary of an interview of Mr. Quinn done by an advertising firm called Olson, and this was a firm that Fair Isaac had retained to do some work for it and Olson conducted an interview and asked some questions of some Fair Isaac employees, including Mr. Quinn.

And this document will be back in the jury room with you so you can review it. It's EX 310 and here's one of the questions and the answers that Mr. Quinn gave. He was asked -- and this was in 2006. Keep the date in mind. This was in July of 2006, so we're talking well after that mid-2004 time period that really matters for secondary meaning here. And he was asked: "What would consumers say Fair Isaac is best at?" And his answer? "Would have never

heard of Fair Isaac. Don't know what it is, what it does ... the name doesn't exactly roll off the tongue."

Another Fair Isaac employee that you heard from by video deposition, Mr. Andy Jolls of Fair Isaac, he was the head -- for a period of time the head of Fair Isaac's consumer business, the myFICO business. He testified during the defendants' case by video, but he was also interviewed by Olson and there was a summary prepared and Judge Montgomery admitted that one into evidence. That's EX 309 and you'll see that back in the room when you deliberate.

So Mr. Jolls was asked: "How would your consumers describe the FICO score?" "Most can't." "What would consumers say Fair Isaac is best at?" "Most can't." Most consumers don't know that much about credit scoring. Most consumers don't have an association with Fair Isaac or any other scoring service. You heard that from Mr. Danaher and there's no evidence to the contrary.

Now, you're going to have to be the judge here again, but please keep these pieces of evidence in mind as you consider what the evidence is about consumer association between 300 to 850 and a single source.

Let's quickly cover some of these other factors here. Exclusivity. I won't spend a lot of time on that, but one of the factors is, was Fair Isaac ever the only one using score ranges overlapping 300 to 850 in the credit scoring

space. Mr. Oliai came in from Experian and walked you through -- constructed this timeline. And there are other documents that were introduced into evidence that talk about these scores as well, but as you know, going way back to the early period of credit scoring, late 1980s, early 1990s, Fair Isaac has never been the only supplier of credit scores with ranges overlapping 300 to 850, and that's true. You know, Fair Isaac wants to draw a big clean distinction between the lender market and the consumer market and they say don't worry about the lender market. Only focus on the consumer market. But as we've heard, there is a connection and Mr. Schutz in his opening did recognize that there's a spillover is I think the term he used between the two, and that's because in the consumer market you're selling educational scores that are trying to give lenders (sic) a feel for what they might see from their lenders, and lenders are using a lot of different scores. Fair Isaac's the biggest, to be sure, but they're not the only one, and so there is a connection.

But in the lender space it's clear Fair Isaac has never been exclusive and in the consumer space that's true as well. Fair Isaac introduced its score, its FICO score, to consumers in 2001. You heard from Mr. Oliai that Experian launched its National Consumer Score, the first score that it sold to consumers, in 2000 with the 340 to 820 range, so Fair

Isaac hasn't been exclusive in either segment.

Okay. Let's go back to the list of factors. Advertisement. I won't spend a lot of time because we've kind of covered this, has Fair Isaac advertised 300 to 850.

Did you hear anybody come in and say: "We spend X amount of dollars advertising, doing TV commercials, doing radio, doing whatever, doing Internet banner ads, whatever it takes"? You didn't hear any testimony about that, none at all. I played for you at the beginning -- and you may recall in my opening statement I played for you the one and only TV commercial that Fair Isaac has ever put out, and this was for the Super Bowl in 2003. Remember that? You probably don't, but that will be back in evidence and you'll be able to look at it if you want to see it again.

But the key point is that that commercial, their big shot at the consumer market, did not even mention 300 to 850. The term never gets mentioned, in graphics, in the voice over, at all. What do they use? Their real source indicators, FICO, myFICO, their real trademarks. That was the only -- that's the only TV advertising they've done. Did you hear about any radio, billboards, magazines, whatever else? You didn't hear any evidence like that for FICO at all, let alone 300 to 850.

And you heard from Mr. Danaher, from Mr. Williams of Experian, about how -- that aggressive TV advertising and

the -- you know, the banner ads and things like that. It's expensive, but that's the way you succeed in marketing a brand in the consumer space. Fair Isaac just never has done that. It has never used 300 to 850 as a brand through its advertising or any other way.

Okay. Let's go back to the factors, to the last one, thankfully, and this one is the issue of intentional copying of a trademark. This is the one that Fair Isaac is emphasizing the most. And you'll hear from Judge Montgomery that it can be a factor if you intentionally copy somebody's trademark. That can be a factor on secondary meaning. And Fair Isaac says that Experian copied Fair Isaac's scoring range when it shifted its score range from 300 to 900 to 330 to 830, and Mr. Oliai testified about that and the reasons for that.

But keep in mind that what this factor is, it says intentional copying of Fair Isaac's trademark, and remember -- let's go back to the timeline. The PLUS Score was introduced in 2003, and Mr. Oliai testified -- and you've heard it again and again, I already talked about it -- about how at that time in that 2003 time period, nobody had an inkling that anybody was claiming a trademark in a score range. Nobody had any idea that Fair Isaac was getting ready to pounce four years later with a trademark claim. So how can you say that Fair Isaac (sic) intentionally copied

somebody's trademark when it didn't even know that there was a trademark? It just doesn't make sense.

Now, Fair Isaac has said that Experian -- you've heard this again and again. We could have picked any range, any number of ranges, an infinite number, but Mr. Oliai talked with you -- and you've heard it from the other witnesses as well -- that, you know, the PLUS Score was designed to be this educational score. It was designed to give consumers a look and feel of what lenders -- the types of scores lenders were using, which certainly included the FICO score, which was the biggest, but it was others as well and no one thought that there was a trademark.

And when it comes to the lender side of the business, you've heard a lot of testimony about how lenders' systems are set up to accommodate three-digit ranges. That's what lenders prefer. And Mr. Oliai said, you know, it's common sense. You want to make -- even though it's technically possible, you could say it's merely cosmetic to have a particular score range, but when your main customers are used to a particular thing like it, you're going to want to make it easy for them to buy your product, especially when, you know, they're going to have to make a switch.

Now, every witness has testified -- I mean, every witness that's been asked about this has testified to the same effect. You heard it the other day from Ms. St. John by

videotape deposition. She said that the reason -- that one of the reasons that Fair Isaac selected a three-digit range originally was because that's what lenders' systems were set up to accommodate.

Mr. Osborne of Fair Isaac by videotape testified that lenders' systems are all calibrated to particular score ranges and it would be a big effort to switch out to some different range.

And you also heard the same thing from Mr. Wilson of ChoicePoint and Mr. Christiansen of LexisNexis. They're the ones who aren't parties to this case and they both came in and said the reason they selected three-digit ranges was because that's what they perceived lenders prefer.

So that the truth here is that the selection of score ranges was driven by customer desires, the desires to please customers and to compete, not by any kind of desire to copy a trademark, because again, at these points in time nobody even realized anybody was claiming trademark rights.

So, that brings me to the end of the secondary meaning factors and I would just -- let's go back to the list. I would just -- I would just sum it up by emphasizing again that you need to focus on whether this secondary meaning has been shown before that 2004 time frame, because that's the ultimate decision here.

Now -- and again, if you find that secondary

meaning was not established by mid-2004 in 300 to 850, then you would answer no either to the first question and/or no to the second question on the jury verdict form and that's the end of the 300 to 850 case.

I do need to go a little bit further, though, because let's -- even if you were to find that secondary meaning did come into play at some point, you still have to find infringement in order to find against my client, Experian. And as you're going to hear from the judge, the only way you can infringe a valid trademark is if the evidence shows that consumers were likely to be confused about the source of the product you're selling by the way you used that allegedly infringing thing. In this case it would be the 330 to 830 score range of Experian.

And, you know, Judge Montgomery again is going to give you some factors that you can consider and let's just put up a representative group of the factors here.

The first one is the strength of the 300 to 850 trademark. You know, you heard from Mr. Anderson, he went through that list of the types of trademarks, you know, running from fanciful down to suggestive, down all the way to generic, and descriptive was the second to the bottom on that list. And at most -- if you find that 300 to 850 ever acquired secondary meaning -- and again, I think the evidence says exactly the opposite -- at most this thing is a weak

trademark and you can factor that in as to whether anybody's likely to be confused by the way Experian used its score range. And really in a lot of ways the most important factor here is how did Experian use its score range. Did it use it, did it present itself in a way that was likely to make people think they were getting a FICO score.

And let's take a look -- I'm running out of time here, but Mr. Williams from Experian walked you through a comprehensive set of Experian's websites and the ways in which it communicates its scoring services to the public, and Experian has major websites. Things like National Score Index you heard about, CreditXpert, freecreditreport.com, and here's National Score Index. Again, you have to be looking at is Experian using its score range in a way -- in a trademark way. Is it featuring or trying to make people think: Hey, I could get the 300 to 850 score here.

Where is the score range on this page? Well, it's way down here at the bottom, 300 to 900, so this was right after Experian introduced 300 to 850. Is that featuring it? And what's it doing there? It's telling you what the scoring range is. And is there anything about this web page that would make you think this is something from Fair Isaac? It says Experian all over the place.

Let's just blow up this piece here. You know, it says the PLUS score. It doesn't say anything that sounds

like a FICO score. And right underneath it says "Developed by Experian."

Let's go to the next -- and, you know, you see Experian trademarks all over the place. This is the next page -- this is the next page on that website, and again Experian trademarks being featured. And where is the score range? Well, down here. And what's it doing there? It's telling you what the score range is. It's describing this product. It's not featuring it as a trademark. It's not using it as a way to confuse people to think they're getting a Fair Isaac score.

Let's very quickly go to the freecreditreport.com. This freecreditreport.com is Experian's big website. It's its flagship website. It's the one you see in these commercials on TV all the time with these guys playing guitar. They are really featuring -- they're advertising that brand.

But let's look at freecreditreport.com's landing page. Is 330 to 830 even mentioned? Is 330 to 830 being used to tell you that this is what we're selling, the 330 to 830 score? No. They're not featuring the score range, using this thing as a trademark. And what do we see? We see Experian, we see Experian's trademarks, the ones that it is promoting as indicators of source.

And on every web page -- Mr. Williams talked to you

about this -- on every web page of Experian there's also this page that tells you about the PLUS score, and it contains that same language that I talked to you about on the National Score Index web page, and let's just -- you know, the Experian-developed PLUS score, the score range, ranging from 330 to 830. These websites are not -- are being up front this is Experian, and you're going to have to be the judges. By these websites, is Experian trying to make people believe that they are getting a 300 to 850 FICO score?

Now, Mr. Schutz put up a TV commercial and a whole bunch of banner ads, you saw the big stack, and focusing on the fact that those banner ads and the TV commercials reference numbers, and here's just some examples.

In that big stack of banner ads, for example, take a look and virtually every one of these banner ads has a trademark on it, Experian, consumerinfo.com, and it's using numbers, but Ms. Kramers-Dove admitted during her cross-examination that Fair Isaac doesn't have a trademark in individual numbers. It couldn't claim that it had a trademark in individual numbers. And you won't see 330 to 830 being featured in any of those banner ads or the like. It's just not there. So you should consider, if you even get to this issue, the way in which -- look through these websites and consider the way in which Experian was marketing itself, was it trying to make people think that it was Fair

Isaac selling the 300 to 850 score.

Okay. Let's go back to the factors very quickly here. Surveys. I won't talk about them any further. Mr. Berger is Fair Isaac's survey expert on likelihood of confusion. I won't say any more about that.

Let's go to the next factor, evidence of actual confusion. This gets me back to the discussion I had at the opening with you about what is the right kind of confusion. You're going to hear from Judge Montgomery in the instructions that general confusion about credit scoring or credit reports isn't sufficient to show likelihood of confusion because that's the wrong kind of confusion. We all know there's a lot of confusion out there about credit scores, who sells them, what they are, et cetera. The kind of confusion that matters here is confusion about source arising from the score range, so it would have to be somebody saying: "You know, I bought the 330 to 830 score from Experian, and because I know that 300 to 850 is associated with one source or with Fair Isaac, by buying that Experian score I thought I was getting a FICO score." That's the right kind of confusion. That's the kind of confusion that you need to see whether any of it exists.

Now, Mr. Schutz will perhaps talk to you about some of the consumers calling in or writing e-mails and things like that with questions and maybe even complaints, and I

just want to show you one example to give you a flavor for this.

One of the e-mails, somebody writes in and says: "Is my PLUS score from Experian and my FICO score the same? What are the differences, if any?"

Okay. Is that confusion about score range? There's no suggestion that this person at all is confused about score range. This person knows that he or she got an Experian score and a FICO score and is asking what's the difference. That's not the right kind of confusion. So I would ask you as you go through the evidence to see if you see any evidence of that kind of confusion, the right kind of confusion.

Okay. You are also going to hear about some defenses that would only -- you would only need to get to these, again, if you find that 300 to 850 was ever used as a trademark, it developed secondary meaning in time and there was infringement, but it's important to think about some of these defenses and Judge Montgomery will give you the full legal standard on those, but one of those in particular I want to focus on, fair use. And you're going to hear from Judge Montgomery that it's a complete defense to a trademark claim if a defendant uses a trademark term simply to describe its services and not as a trademark and does that in good faith. That's called fair use. And we've already talked

about how Experian presented itself and how it used and marketed its scores, and I'd ask you if you even get to this point really consider those uses by -- those communications by Fair -- by Experian, I'm sorry -- and ask yourself is Experian using 330 to 830 as a trademark. I don't think you're going to find any examples of that.

All right. I'm coming up to the end here and I want to just make one -- a couple of last observations. And you might be asking yourself, you know: Why is Fair Isaac doing this? Why is it pursuing this lawsuit if this trademark is so worthless?

Well, you heard from Mr. Danaher about how Fair Isaac hasn't been willing to sort of invest the money, the big resources to really advertise aggressively in the consumer space and to do what it needs to do. And Fair Isaac is used to being dominant in the lender space. It's got the big lion's share of the market.

But remember there was this pie chart that came up in Mr. Danaher's examination and it showed that Experian had, like, 37 percent of the market; another company, Intersections, another supplier, had a big percentage. And FICO is kind of low here and even if you count Equifax, it's still behind those others and that kind of made Fair Isaac very happy. And this is from 2005. So also, you heard about the entry of VantageScore in 2006, which was something that

was going to put pressure on Fair Isaac. And so it had a choice. It could sue or it could compete, it could invest the money in competing, and you're going to have to make a decision about what it actually -- what choice it made here.

Now, what Fair Isaac wants to achieve here with this case goes beyond just money. I mean, they're asking for damages, but what it wants to do is it wants to block Experian, TransUnion and VantageScore from competing with three-digit scoring ranges. And without the ability to use those three-digit ranges, as we've heard, it's going to be very difficult for those companies to compete. And so I would ask you as you go back and consider the evidence, look at the evidence and decide for yourself has Fair Isaac ever used 300 to 850 as a valid trademark.

Thank you so much again for your patience and time.

THE COURT: All right. Let's take a standing stretch break. Any of you -- we're going to have use our time carefully this morning. Any of you that need to make a bathroom run, feel free to do it now. We're going to go ahead and have a longer break after Mr. Remele's argument, but if you need to make a quick exit or any of the attorneys do, we'll stand and stretch for a couple minutes to give anybody that really needs to get to the bathroom a chance to do so. Now I've embarrassed you all so that nobody --

(Laughter)

THE COURT: Okay. If I leave, would anyone else leave?

Looks like you can all make it, so we'll stretch a little bit. I'm sorry. I didn't mean to embarrass anyone.

(Pause)

THE COURT: All right. Please be seated.

We will now proceed to the argument of TransUnion as given by their counsel, Mr. Lewis Remele.

Mr. Remele.

MR. REMELE: Thank you, your Honor.

DEFENDANT TRANSUNION, LLC'S CLOSING ARGUMENT

MR. REMELE: Good morning.

As you've now heard, the judge has shared the instructions that she's going to give to you after everybody has argued and she's also shared with us the verdict form that you heard a little bit about, and so we're at a little bit of an advantage over you in the sense that we already know what she's going to tell you. And so what I hope to do is to go through each of these questions on the verdict form and how the law that the judge is going to give you integrates with these particular questions as well as the evidence, at least as we see it, from TransUnion's perspective. And my hope is that at the end of my argument I'll have provided you some guidance or assistance on how you should answer this particular verdict form at least from

TransUnion's perspective.

Before I do that, though, I also want to take a chance to thank you for your service as jurors. Mr. Danaher and TransUnion are very appreciative of the fact that you've taken time from your busy lives and all the things that you're doing to come here and help us resolve this dispute. We know it involves a sacrifice and we really do appreciate it. And as Mr. Milne said, your patience has been biblical and we also, all of the lawyers, greatly appreciate that.

Before I talk about the actual verdict form, I want to talk to you -- I want to highlight for you some general instructions that the judge is going to give you. Some of these you've heard a little bit. You may not remember when the judge talked about them at the beginning of the case. These are instructions that are basically given in every case, every civil case, and I think that sometimes we lawyers gloss over them, but they're very important.

The first one that I think is very important and that I always talk to jurors about in cases like this is the instruction on how to judge the credibility of witnesses. You may remember that the judge indicated you're going to be the judges of the facts and she's going to read you a fairly long instruction about some guidelines that you might use in determining whether particular witnesses are telling the truth or evaluating the evidence as you've seen it over the

last few weeks and as you'll then get a chance to review it in the jury room whether it's credible or not.

But what I want to underscore -- and you're going hear this in the instruction and you've heard a little bit about it already -- is, she's going to tell you that you should use your common sense. And the reason I think that's so important is that I have a lot of friends that ask me on a regular basis: "How is it that you can bring a bunch of people off the street into a courtroom, assault them with very complex information, how can that possibly work?" And I always say: "It's easy." And the reason it's easy is because when you walk through the front door of the courtroom, nobody said you were supposed to leave your common sense in the hallway. And the reason why the jury system is great and it works is, when you all go back in the jury room, you're going apply all of your life experiences collectively, all your wisdom, all your judgment that you have from your various experience in life, and you're going to use your common sense to evaluate the facts of this particular case, so you're going to hear me refer to that a little bit when I talk about the verdict form.

The second general instruction the judge is going to give you is that a party isn't required to call all the witnesses that might have knowledge or facts about the case, nor is it required to bring into the courtroom every possible

exhibit or document that might be applicable to the case, and that's true and she'll give you that instruction and you'll hear it.

But she's also going to tell you another thing, and that is that Fair Isaac in its infringement claim, which we'll talk about in a minute, has the burden of proving that. And what that means is -- and she'll explain it to you -- is that they have to prove by a greater weight of the evidence that it's more true than not true that we, TransUnion, have infringed upon their trademark.

The only witness that Fair Isaac brought to this trial was Ms. Kramers-Dove, by her own admission somebody who doesn't work in the consumer side of the business, which is what this case is about, and didn't know anything about trademarks. So your common sense might tell you that if somebody has the burden of proving a claim, that it might be an indication of the strength of their claim if the only witness they brought into the courtroom was somebody who had no knowledge about all the things we've been talking about for the past three to four weeks.

It also might suggest to you that as you noticed, the way they tried to prove their case was by calling our witnesses and cross-examining them. Again, it might be a suggestion if you use your common sense about the strength of the particular claim that they're making.

Let's talk about the verdict form. And you're going to have this when the judge gives you instructions and so I'm going to read this to you so it'll become familiar to you.

But this verdict form is basically divided into categories of four questions. The first three questions relate to this claim of infringement.

Then there's going to be a series of questions -- they're actually at the end of the verdict form -- that relate to our claim that Fair Isaac committed fraud on the Patent Office, the Trademark Office, when it submitted its trademark registration.

Then there's a series of questions in a category called affirmative defenses, the defendants' affirmative defenses, and I'll talk to you about those and what those are and what they mean and why they're important.

And then lastly there's questions about damages.

As Mr. Milne indicated to you, there's instructions on the verdict form and you're going to see that if you answer the question -- like Question Number 1 a certain way, there's going to be an instruction that you don't need to answer some of the other questions, and there are going to be instructions like that and I'll point them out to you as we go through the verdict form.

But even though that's what it says, what I'm going

to do is, I want to talk to you about each question on the verdict form and how we believe from TransUnion's perspective you should answer that question on the verdict form, even though it may be as you get through your deliberations that you may end up never getting to those questions, but I want to give our perspective in case you don't necessarily agree with some of the things I'm going to tell you about what TransUnion sees as the evidence.

So let's talk about the question on the infringement claim. The judge is going to give you an instruction that there are two elements to the infringement claim and those two elements are this: In order to prove a claim of infringement -- and this is on the 300-850 trademark -- Fair Isaac has to first prove that they have a valid trademark, and that's where this concept of secondary meaning comes in and I'll talk about that in a minute.

The second element actually has two parts to it, and it is that if you find that there is secondary meaning, then you go to the second element and the second element is that we used that trademark, TransUnion used it, without Fair Isaac's consent in an attempt to try to confuse consumers, ordinary consumers, as to the source of that particular trademark.

So those are the two elements and, as you might have guessed, they relate to the first three questions on the

verdict form.

So the first question on the verdict form is this: "Has '300-850' acquired secondary meaning?" And it's -- the simple instruction is yes or no. I think you probably gathered from everything you've been hearing over the last few weeks that we would suggest to you from TransUnion's perspective the answer to that question is no. Why do I say that?

Here's what the judge -- Mr. Milne talked to you a little bit about this, but I'm going to tell you -- I'm going to focus in on some things at least from TransUnion's perspective. Here's what she's going to tell you secondary meaning is.

She's going to tell you that basically: "A term acquires secondary meaning when it has been used in such a way that its primary significance in the minds of the prospective consumers is not the product itself, but the identification of the product with a single source, regardless of whether consumers know who or what that source is."

So I was thinking about this last night and I was trying to think: How can I capsulize all this legalese for you and try to give you some illustration of what do we really mean by secondary meaning, and the old adage came to mind that a picture's worth a thousand words.

And, Ryan, could you put up that -- there it is. And here's what I put together, I crafted. And what it is is, we look at all of these -- visualize yourself driving down the road and you see a billboard, and if you saw a billboard that had any of these common logos that we see there, you would immediately associate those with a particular product, a particular company, some source. That's what we mean by source. But what would you do if you were driving down the road and you saw a billboard that had 300-850? Would you associate that with anything? You'd be probably asking yourself: "What the heck is that? What are they talking about? What are those numbers?" That's what we're talking about in a very general way when we talk about secondary meaning, and I would suggest to you it's that simple in terms of how you can answer this question on the verdict form, that if you think and use your common sense, how could anybody associate with source with 300-850.

But the judge is going to tell you -- as you go further in this instruction, she's going to give you some guidelines about what you might -- some factors you might think about to determine whether this is secondary meaning, and I'm going to talk to you about each one of those, because I think they're important and they overlap with some of the other things I'm going to talk to you about on the verdict form, so hopefully I won't be repeating myself.

The first factor: whether the consumers who purchase the products or services that bear a 300-850 trademark associate that trademark with a single source.

Well, let's go back to Mr. Danaher's testimony on this subject, and I think, hopefully, you heard from Mr. -- you understood and heard from Mr. Danaher that what Fair Isaac -- its whole position in this case is that it felt that because it had such prominence in the lender market, the business market, that that would easily translate over to the consumer market and that consumers -- because lenders knew who Fair Isaac was, consumers would immediately associate -- once they started hearing about credit scores, they'd associate the FICO score with Fair Isaac and they'd associate the score range 300 to 850.

That's what Mr. Danaher talked about, the indirect method of marketing as opposed to direct marketing, and you heard him tell you that in fact he conducted that experiment. He set up two storefronts. One storefront sold FICO scores through TransUnion, through the TrueCredit operation, the other storefront, they sold TrueCredit scores directly to consumers. And you heard what he told you, that the only -- in the time that he was doing this, none of the consumers associated 300 to 850 with Fair Isaac, or with TrueCredit, or with anybody for that matter. You heard him tell you that most consumers during this period and even up to the present

time don't know even what a credit score is much less who the brand is. You saw some of those percentages and he told you even in TrueCredit's case where they've done a tremendous amount of advertising and Experian's case where they've really done a lot of advertising, consumers still don't even associate those brands, and they clearly don't associate a particular product with 300-850, and the reason is because Fair Isaac has chosen to use this indirect method of marketing. They've chosen to try to play off of their strength with lenders hoping that will spill over into the consumer market, and as Mr. Danaher told you, that particular marketing strategy has proven to be unsuccessful. As he indicated to you, the only way that you can succeed in the consumer market is if you advertise directly to consumers.

The second factor she's going to tell you: to what degree and in what manner Fair Isaac may have advertised under the 300 to 850 trademark. It didn't. It simply didn't do any advertising. We've heard about the fact that all it did was indirect marketing. It didn't want to spend the money to do any advertising relating to the score range much less to its brand, the FICO score.

Factor three: whether Fair Isaac successfully used the 300-850 trademark to increase the sales of its products or services. Well, here we call back the evidence -- and I had quite a discussion with Ms. Kramers-Dove about this. You

remember the internal guidelines, the almanac, which by the way is Exhibit 137 if you want to look at it when you get back in the jury room, their own internal guidelines about how to use a trademark if in fact you're claiming one back in the '04-'05 time frame. And you remember they said if you're going to use a trademark, you have to use it as an adjective, so here it would be the 300-850 score, the 300-850 FICO score. And we saw a whole bunch of websites, pamphlets, e-mails, information where Fair Isaac has never, never, never used in any of its publishing or its advertisements 300-850 as the center of any marketing campaign. And you remember I asked Mr. Danaher has TrueCredit ever used 300-850 as a brand, and he said no. And I said why, and he said because it would never be successful for the same reason as what we looked at on that slide. If you use 300-850 as a brand, who the heck as a consumer would know what you're talking about. You would never do that if you wanted to be successful in marketing to consumers.

Factor four, the judge is going to tell you, the length of time and manner in which Fair Isaac used the 300-850 trademark. Well, this goes to this issue, as you all know by now, I hope, they kept this secret. Fair Isaac from the time that they claimed they first started to use this in 2001 up until 2006 when the Trademark Office issues a registration, Fair Isaac never put anybody on notice, even

though in TransUnion's case, as you know, in 2004, in March, it renegotiated its contract with TransUnion. In fact, a month after it had filed its registration with the Trademark Office in February of 2004, never told them about the registration and never amended the agreement to add 300-850 as a trademark. Wouldn't you think, particularly when you were going to sell competing products, that if you really felt that you had a trademark or you had exclusive rights to that range you'd tell somebody, particularly a competitor?

In June of '04, you remember the agreement that they also negotiated on June 1st of '04 that related specifically to trademarks, again didn't mention 300-850 as a trademark, talking directly with TransUnion during that time period and knowing, knowing, knowing that TransUnion was selling at that time the TrueCredit score with a score range of 300-850. How do we know that? Mr. Danaher told you that he had numerous conversations with the myFICO people during 2004 to tell them that they were using 300 to 850 to sell the TrueCredit score, which was competing with FICO, never heard a peep from Fair Isaac that there was anything wrong with that, that they had any exclusive rights.

Mr. Jolls, who you heard from in deposition testimony, who was the head of myFICO, you heard Mr. Danaher say: I know Mr. Jolls knew, because he bought our products on our website. And Mr. Jolls confirmed that in his

deposition, that he in fact was a subscriber to TrueCredit.

And we all know because you've seen it *ad nauseam* that when you went on our TrueCredit website, one of the first things you saw was the scale that we used which showed the range of 300 to 850. Nobody was trying to hide that. So in Fair Isaac's case, it simply didn't use the 300 to 850. It never used it on a exclusive basis.

And that's the next factor, whether Fair Isaac's use of the 300-850 trademark was exclusive. It wasn't. In fact, not only wasn't it exclusive, it tried to hide the fact that it was filing a registration from TransUnion and Experian and it never used or put on notice any of its competitors by using symbols or telling them -- forget about symbols. How about just a letter? How about when you're negotiating with them telling them: "Hey, we think we have exclusive rights to this"? Never did it, even though it was clearly required under their internal company guidelines as we saw both in the almanac and in the guidelines. And why did they have those? Exactly for the reason that we are doing what we're doing here today, that I'm here arguing before you that if you don't put people on notice that you have exclusive rights, you're going to lose the ability to enforce those rights. And that's exactly what that almanac says and that's what those guidelines say, and that's why they try to emphasize to Fair Isaac employees that they

should use those symbols.

Factor six: whether the defendants intentionally copied Fair Isaac's 300 to 850 trademark. Here you're going to -- this is Fair Isaac's case. TransUnion used 300-850 to sell TrueCredit scores. We've never hidden from that. I told you that in my opening statement, Mr. Danaher admitted it, and what this factor really gets at is the intention part, were we intending to do that to try to confuse people or trick consumers into believing they were buying a FICO score when they were buying a TrueCredit score. Again, you heard mountains of evidence, particularly from Mr. Danaher, that consumers don't know what 300 to 850 is. They don't associate it with anything and they certainly aren't confused by it.

But you also heard from Mr. Danaher that his business model is such that when he's directly advertising to people, it costs him between 70 to $80 to get a customer. And what he wants to sell them is not a credit score. I mean, that's part of it, but that's a very small part of it. What he wants to sell them -- he wants to make them loyal customers so they'll become subscribers and they'll continue to be with TrueCredit on a monthly basis over a long period of time so that he can recover the money that he spent to try to obtain that customer. And I think based on his description, I think it was quite clear that it wouldn't make

any business sense to try to confuse people or trick people into buying your product thinking they're buying another product. What sense would that make? It would be the dumbest business decision you could ever make, because all you do is make people mad and the first thing they're going to do is cancel their subscription.

The last piece of this, as you heard, that in fact when Mr. Danaher set up these two storefronts he said: "Okay. I'm going to be selling a product which is a FICO score through the CS website and at the same time I'm going to be selling a TrueCredit score through the TrueCredit website. Both of them have the same score range. One's a FICO score, one's a TrueCredit score. Maybe somebody is going to think that they've gotten a FICO score rather than a TrueCredit score, so what should I do?" Well, right from the beginning in 2003 he put a disclaimer that you saw in the website on the credit page that specifically says: "This is not a FICO score." That's what he did.

And then -- that was in December of '03 when they launched the new TrueCredit product with the score range of 300 to 850, and ten months later when they were still a minor -- people were calling and saying: "Hey, we still have some issues with this about FICO scores," so what do they do? They redesign the website so that any time you clicked on credit score wherever it appeared in the website on

TrueCredit, you would immediately be brought back to the page that had the disclaimer that said: "We don't have" -- "This is not a FICO score." In other words, there wasn't any intent here to try to deceive people, to try to deliberately mislead people by copying something. There was a real attempt here to try to use a test to see whether or not the FICO scores would sell better or the TrueCredit scores would sell better. That's what the concept was with the two storefronts.

And that's the next factor that the judge is going to tell you, whether the defendants' uses of scoring ranges claimed to be similar to the 300 to 850 mark has led to actual confusion regarding source.

And again, the storefronts -- you know, you heard about surveys, and Mr. Berger never even asked a question about 300-850. His survey is useless. He didn't even ask the question that's been central to this case for three weeks. Mr. Johnson did ask that question. So you might -- you know, you might say to yourself: "Well, heck, I heard from those experts and one says one thing and the other says another thing. You know, what are we supposed to" -- "how are we supposed to figure that out? Maybe they cancel each other out."

Well, I would suggest to you that the best evidence of the fact that -- we don't really need a survey, because

Mr. Danaher conducted the best thing that you can conduct to determine whether people are confused, and that's the fact that he did two storefronts. And he tried to sell FICO scores in this indirect channel based on Fair Isaac's belief that it in fact had gained this notoriety on the lenders' side of the business that was going to translate into the consumer side, and in fact it didn't work. And clearly nobody associated 300 to 850 with that product. If they had, you would have seen that particular storefront selling loads of FICO scores.

The next factor is the result of consumer surveys. We touched on that.

And the last factor the judge is going to tell you is the extent to which Fair Isaac holds an established place in the market, and that gets to Mr. Danaher's testimony again where remember I asked him: Okay. Let's fast forward now. Here we are today. Where is Fair Isaac in the consumer market? And he said they're non-existent, basically. They just aren't a factor in the consumer market. They're not competing. There are other people that are competing in the marketplace, but the reason they're not competing is because they won't spend the money to do the direct advertising that you need to do in order to be successful in the consumer marketplace.

So the answer to Question Number 1 I think should

be no when you weigh all those factors that the judge is going to give you.

The second thing the judge is going to tell you is that even if you find that there's secondary meaning, that doesn't end the inquiry. The second question is: "Did '300-850' acquire secondary meaning before the following Defendants' allegedly infringing uses?" This is the question did 300 to 850 acquire secondary meaning, identification with a source, in TransUnion's case before December of 2003. That's what Question Number 2 is, and if you answer this -- we believe the answer to this question should be no, and here's the reason why I say that:

You heard through all of the evidence that this consumer marketplace didn't even get going until 2001. That's when myFICO was established. There wasn't any real sales of consumer -- products to consumers until 2002. You heard that that was the date of the first agreement between TransUnion and FICO, Fair Isaac. So by December of 2003, this is really still a young emerging market.

As you've heard somewhat *ad nauseam* from the various witnesses, consumers didn't identify -- they were confused not only about whether or not -- what a credit score was, but they were confused about who was who selling credit scores. They didn't even identify even with particular brands. So clearly by 2003 they hadn't acquired this term of

secondary meaning. And by Fair Isaac's own admission, it wasn't doing any advertising between 2002 and 2003 directly to consumers to try to create that kind of secondary meaning, that it would be in the forefront of consumers' minds at that time frame.

And why do I say December of '03? I kind of noticed when I had to recall Mr. Danaher the other day, everybody went, "Oh, no. What's going to happen now? Are we going to be here for another week?" And I didn't blame you. And the reason I had to recall him, because I thought it was undisputed that we relaunched the TrueCredit product with the score range of 300 to 850 on December 18th of 2003, because that's what he testified to. Well, in fact, apparently there was some dispute about that, so that's why I introduced those two exhibits, and if you want to look at them, they're Exhibits 112 and 113, and they established clearly that that's when -- on December 18th of 2003 is when TrueCredit launched the new TransRisk score, the new version, using the score of 300 to 850, so that's why I say that's the date. So Question Number 2 should be no.

That doesn't still end the question of whether or not there's infringement. We're talking now all about infringement. So the first element, secondary meaning, whether it's valid. The second element is whether or not we, TransUnion or TrueCredit, used this market without Fair

Isaac's consent in an attempt to try to confuse ordinary consumers as to its source.

So, this is a two-part question and this is Question Number 3 on the verdict form: "Did the following Defendants use a mark the same as or similar to Fair Isaac's '300-850' without Fair Isaac's consent in a manner that is likely to cause confusion about the source, sponsorship or affiliation ...?" Again, we believe the answer to this question should be no. Why do I say that?

First, it's clear that we did have Fair Isaac's consent, and why do I say that? Again, go back to this 2004 time frame when we negotiated the two contracts with them, never heard a peep from Fair Isaac about the fact that they were claiming exclusive rights to 300 to 850. Secondly, Mr. Danaher's testimony. The myFICO people clearly knew we were using 300 to 850 as the score range for the TrueCredit product. Mr. Jolls confirmed that. That's consent. And if you consent to somebody using your trademark, you can't claim they're infringing it.

And the second piece of this again goes to this confusion question and here's what the judge is going to instruct you on confusion. This is not general confusion. This isn't confusion as to whether I got a FICO score versus a TrueCredit score or a PLUS score. This is specifically confusion as to whether or not I thought because of the score

range 300 to 850 I was buying a FICO score versus a TrueCredit score. That's the specific question or confusion that you have to deal with and the judge is going to instruct you on that. She's going to tell you that general confusion about credit scoring or reporting is not sufficient. That's part of the instruction she's going to give you. She's also going to give you a number of factors that you can look at for purposes of looking at confusion, but I've covered most of those. Again, we go to the question of Mr. Danaher's testimony as to whether or not consumers really are confused and we go to the business model.

Let me turn to the second category on the verdict form and I'm going to move this up. These are Questions 9, 10 and 11 and they relate to the claim of fraud on the Trademark Office. And the question is -- Question Number 9 is: "Did Fair Isaac make a false representation of fact during the application process to the United States Patent and Trademark Office for registrations of the '300-850' trademarks?" And number 10 is: "Did Fair Isaac know the representation to be false when it was made and intend to deceive the United States Patent and Trademark Office?" Question Number 11: "Did the United States Patent and Trademark Office rely on the false representation in deciding to issue the registrations?"

Okay. And these questions you need to answer no

matter how you answer -- even if you find that there's no infringement. In other words, if you agree with us and you answer the first question no or the second question no, you still need to answer Questions 9, 10 and 11.

Now, what are we talking about here? I think you probably have a pretty good idea of what we're talking about, but let me go back to the chronology.

February 4th of 2004 they filed the registration for the 300-850 trademark. On August 28th, I believe it was, of 2004 it's denied, and it's denied because it's descriptive. All it does is describe a range and that's what the trademark examiner said. They file a response to try to change the examiner's mind on February 28th of 2005, exactly six months after the denial, and in that response, you heard Mr. Anderson talk about, they listed I think four or five reasons, and he said that the only reason that they gave in that response that had any ability or colorable reason for the trademark examiner to change her mind was the representation by Fair Isaac that no one else was using the score range 300-850 during the time period that they filed their registration, so this '04 time period. Of course we know, it's undisputed, that starting in December of 2003 TrueCredit was using the score range 300-850 for the TrueCredit score, so that's undisputed.

So the question then becomes, is, when they made

that representation, did Fair Isaac have knowledge and did they intend to misrepresent that fact to the Trademark Office and have the Trademark Office rely on it in order to get a registration? Could they -- or maybe state it another way. Could they have gotten a registration had they not misrepresented that fact?

Well, you heard from Mr. Anderson that he believed -- and he would not have granted the registration for all the reasons you heard him tell, but he particularly focused on the fact that they made that representation of fact. Well, what do we know about whether they had knowledge about the fact that we had a score range of 300 to 850?

Well, we have Mr. Danaher's testimony that I've already gone over where he said the myFICO people knew it. We have Mr. Jolls' testimony where he confirmed that he was a subscriber and he knew. How could you be a subscriber of a TrueCredit product, go on their website, which you have to do to subscribe, and not know that we're using the score range of 300 to 850? That's the question.

But in case there was any doubt about it, we have Exhibit 43.

Ryan, can you put up, please?

And you may remember this is the e-mail from December 16th of 2004 -- and you'll have an opportunity to read this back in the jury room -- and you remember I kind of

wrangled a little bit with Ms. Kramers-Dove about this, but here's the sentence that says it all, in my view, and it's this sentence.

Ryan, if you can highlight it.

It says: "They didn't copy our publicized FICO score range until later." Well, what's he saying? Obviously he's saying they didn't copy our score range of 300-850 until later. He clearly knew and that's what Mr. Watts is telling everybody in this e-mail chain, including -- who's the number one person on the e-mail chain? Ms. St. John. She's the one who filed the affidavit under oath with the Trademark Office that you saw and you'll have an opportunity to review that more in the jury room.

And you saw Ms. St. John on the video deposition the other day, and when they started asking her questions about paragraph 12 of her affidavit where she said nobody else was using 300-850, you noticed that she couldn't look at the camera. And again, what does your common sense, what does your life experience tell you about somebody when they're being asked questions and they can't look at either the camera or the person who's questioning them? It tells you they're not telling the truth, and she wasn't telling the truth. She knew, she knew that in fact that was a false statement, and she knew that in fact Fair Isaac needed to have the Trademark Office believe that in order to issue the

registration.

Now, you're going to hear an argument that what she said in paragraph 12 was to the best of her knowledge, nobody else used 300 to 850 as a unique indentifier, and that's the finesse you're going to hear from the lawyers about why she wasn't really -- why she wasn't really lying or not telling the truth. Well, here's what they said in the body of the actual submission that the lawyers gave to the Trademark Office. Here's what the quote was:

"300 to 850 is the credit scoring scale only for applicant's credit bureau-based risk products and not for other types of credit scoring products that the applicant develops" -- that's Fair Isaac -- and here's the rest of the sentence: "or even other credit bureau-based risk products that competitors develop." And if you look at the Exhibit 6, which is the file from the Patent and Trademark Office, you'll see that in the actual lawyer brief or memo that was submitted to the Trademark Office. The reason you have an affidavit is to confirm those types of statements in the actual memo.

So, don't fall for, oh, she didn't really say that it was only -- nobody was using 300 to 850, because this unique indentifier, what it's buzz words for, using it as a trademark. Well, of course you know we weren't using it as a trademark. Experian wasn't using it as a trademark. Nobody

who came into this courtroom other than the Fair Isaac witness believed that you could trademark 300-850 or any scoring range, for that matter. So of course we weren't using it as a unique indentifier. We were using it as a speedometer.

Let's talk about the next category -- I'm moving kind of fast here because my time is limited.

The next category on the verdict form is what we call affirmative defenses, and -- but just to circle back, we believe that in answering Questions 9, 10 and 11 you should answer yes to all those questions. I think that's probably clear.

Now, the next category of questions on the verdict form is what we call affirmative defenses, and that's this. So even if you find that TransUnion infringed on Fair Isaac's trademark, you find secondary meaning and you find consent and confusion in those two elements, that still doesn't get Fair Isaac off the hook, because what the law recognizes is that there are certain so-called affirmative defenses where people that use trademarks can still use them, even if they're valid trademarks, if they use them in a certain way.

And the first affirmative defense -- and it relates to Question Number 4 on the verdict form. You're going to find that all of these instructions have a place on the verdict form -- and that's Question Number 4: "Is the term

'300-850' a feature of Fair Isaac's products or services that is 'functional'?" Yes or no. And we believe you should answer this yes.

What is "functional"? Well, the judge is going to instruct you that what functional means: "A feature is functional if it is essential to the use or purpose of the product or service or if it affects the cost or quality of the product or service. If restricting the ability to use that feature to one provider of the products or services, to the exclusion of competitors, would significantly hinder competitors' ability to compete effectively, the feature functional."

Okay. What does that mean? Translate that. What that means is this is the speedometer. 300 to 850. You remember in opening statement you heard a little bit of reference to this. This is what the equivalent of an automobile speedometer is. 300 to 850 is a range that everybody uses to try to describe a credit score. You can't have a credit score in a vacuum. If you say: "My credit score is 650," it has to have some context. It has to have some meaning as to what that is. That's what the score range is.

So, does anybody seriously think that somebody could trademark a speedometer, 0 to 80, or 0 to 120 in my day. Now I guess it's 0 to 160, whatever it is. But the

point is you wouldn't. If you put "Chevrolet" in the middle of the speedometer, you can trademark that, or you put Ford or Lexis or Mercedes, but you couldn't trademark the speedometer dial.

And the reason why this is functional and the reason it has an impact is, you heard everybody that came into the courtroom tell you that because of the way the world is set up from lenders, banks, everybody, they're all set up to use three-digit numbers. So if you take away the ability to use three digits, if it's either two digits or four digits, you severely hinder the ability of competitors to compete in the marketplace. That's what you would do. So that's what functional means and that's why that's an affirmative defense, that even though it may be a trademark, it may be valid, people are still permitted to use it as long as it's a functional process.

The second affirmative defense -- and you heard a little bit about this already -- is Question Number 5: "Did the following Defendants prove their 'fair use' defense to the claim of infringement of the '300-850' mark?"

And what fair use is, I put some demonstratives up on the screen during the trial and you were probably wondering what the heck is he talking about? Well, what this means is that if you don't use 300 to 850 as a trademark, in other words, you don't make it the center point of your

marketing campaign, you don't make that your brand, you don't try to focus everybody's attention on that so it becomes the adjective, the 300 to 850 TrueCredit score, the 300 to 850 PLUS score. If you did that, then it wouldn't be a fair use. But if you only use 300-850 to describe a feature of the product, in other words -- you've seen the language. Credit scores generally come in the range of 300 to 850. That's the language.

And, Ryan, would you put up the -- here, you saw this during the trial, and what I did is, I tried to put on one slide all of the ways that TransUnion or TrueCredit used 300-850, and you can see none of it, none of it is in the form of a trademark. None of it is an attempt to make that our brand. None of that is an attempt to make that the focus of our marketing campaign.

The last affirmative defense -- and that's Question Number 6 -- is the doctrine of acquiescence, and the question is did Fair Isaac acquiesce to the infringement of 300-850. That gets back to this consent issue. Acquiescence is the first cousin of consent. And so if you acquiesce, in other words, you don't stop people from using it even though they know you're using it, if you acquiesce in it, then you can't assert or try to use that trademark on an exclusive basis. And the evidence of that is the same we discussed about for the concept of consent, the fact they knew we were using it,

they said nothing about it, they had numerous negotiations with us, TransUnion, in '04, never said a thing about it. So again, the answer to that question, we believe, should be yes.

Now, lastly you're going to hear -- the question number -- the last category is damages and there's also a question on the verdict form that talks about willful, whether or not our conduct was willful, and here's what the judge will tell you willful means. This is Question Number 7. A defendant's infringement was willful if you find that the defendant intentionally set out to deceive or confuse consumers as to the source, sponsorship, or affiliation of its products ...."

Well, I think the easy answer to this, obviously we think it should be no. We don't think you should even get here because we don't think there was infringement, but assuming you disagree with us, how can you possibly willfully and deliberately infringe on somebody's trademark when they know you're using it and they don't tell you you shouldn't use it? That's the simple answer to that question, in my view. Fair Isaac can hardly come into this courtroom and argue that we willfully infringed on something when they knew we were using it and said nothing about it.

Now, last, let me talk about damages. And again, I don't -- I think it's clear from what I've been telling you

that I don't think there should be any damages, because I don't think there's any liability, but I want to talk to you about it anyway in case you disagree with me.

Now, I've told you about one way to look at the strength of somebody's claims is what kinds of witnesses they call. We talked that about that a little bit. Another way is if a party wildly exaggerates its damage claims, and what do I mean by that.

Well, Mr. Meyer, the expert, came in here and he gave you three different ranges of damages that were $150 million apart, and what the judge is going to tell you is that when you're looking at damages, they have to be both reasonable and not speculative. Now, how can anybody -- I don't care how many degrees they have or how much education they have. How can they come in here and expect you, using your common sense, to believe that it's okay to either award $150 million or $85 million and there really isn't any difference between either one of them? How can they possibly tell you that and be believable? I would submit to you they can't.

The second part of this -- and this is the Question Number 8, and it's: "What amount of money in the form of a 'reasonable royalty' will fairly and adequately compensate Fair Isaac for any damage caused by Experian's and TransUnion's infringement of the '300-850' mark?" There's a

concept in that question that you really need to focus on, and that's causation. And what that means is -- the judge is going to define it. It means that it had to play a substantial part in bringing about the harm, and here's where this goes:

Mr. Meyer testified that Fair Isaac should get, I don't know, you know, a couple hundred million dollars in lost royalties based on the theory that from 2004 to the present every TrueCredit score, in our case, that was sold would have been a Fair Isaac score. So that everybody that came to our website and bought a TrueCredit score would have been a FICO score. And where was the evidence of that? You didn't hear -- normally there's two ways you get that evidence in if you're a plaintiff. One is through a survey expert. That's one possible way. Mr. Berger never even asked the question about 300-850, so how could we possibly rely on what he said. Or the other way is through a damage expert. They look and they analyze certain things. And you heard Mr. Meyer. He never made any analysis. He just assumed causation. He assumed that if in fact there was a sale, that in fact it would have been a FICO sale. In other words, that royalty should have applied.

Now, I would suggest to you just on that answer alone, Question Number 8, you should answer there's no damages because they haven't proven causation. But let's say

you disagree with me. Well, let's look at Mr. Meyer, again, his credibility as a damage expert.

And, Ryan, could you put up the exhibit that goes to Mr. Meyer's damage analysis.

And you might remember that the way he figured royalties was he used a royalty based on revenues and then he used a percentage.

Well, you remember Mr. Bokhart when he testified, he said, well, first of all, you start with his revenue base. You have to immediately take off $165 million, because Mr. Meyer measured royalties from 2004. Why would you do that? Under anybody's logic, you wouldn't start measuring royalties until they got a registration of their trademark, particularly given the fact they never told anybody they had a trademark. So even if you were to consider damages, you certainly wouldn't start measuring them until 2006. That takes $165 million out of the tank.

The next -- you heard he completely blew it when he was analyzing whether the three-in-one report had a credit score and he counted all of those three-in-one sales as also credit scores, and as Mr. Bokhart told you, that's $150 million you got to take out of the tank.

And then lastly, because of the projections that he did into 2009, you have to take another $69 million.

So we start in terms of his credibility with the

base that he used, the revenues he used, were completely off base, absolutely no credibility. If you start with -- you know, sort of like a three-legged stool. If one leg of the stool isn't any good, it's going to tip over. Well, that's what this royalty base is. If you start with an improper base of improper information, which is what he did, you're not going to have very credible evidence.

Then he talked about a royalty rate of 40 percent, and you remember the way he got the 40 percent was to go back to the 2004 agreement, which is when they were selling FICO scores with a 40 percent royalty, and that's true. They were using that royalty to sell FICO scores through the CS site. But remember, that agreement specifically excluded or didn't mention 300-850.

And now think about this again from a commonsense standpoint. You heard Mr. Danaher testify that the reason he was willing to pay a 40 percent royalty to Fair Isaac is because Fair Isaac claimed that he was going to be able to sell oodles of FICO scores through that site because of Fair Isaac's prominence in the lender market that was going to transfer over to the consumer market, that indirect marketing channel. What that meant is Mr. Danaher didn't have to spend any money of his own on direct advertising to try to get those customers. So he's willing. If he could do that, that's a good deal for him, because effectively he's tagging

along on Fair Isaac's coattails and getting that business.

Well, you heard him tell you it cost $80 to get a customer when you directly advertise, because you got to spend your own money to advertise. So why would anybody in their right mind pay a 40 percent -- when they got the right to use 300-850 and they still have to advertise directly to consumers and spend money to do that, why would anybody in their right mind pay a 40 percent royalty? They wouldn't. So I would suggest to you that Mr. Bokhart's analysis of the damages is a much more reasonable, nonspeculative way to look at damages.

And let me just make one last point on damages. What happens -- Mr. Meyer came in, and the reason he gave you these three series of damages, you know, 80 to 150, or whatever it was, I don't even remember, 350 million, is because what he's hoping you'll do is that you'll give Fair Isaac some fraction of that number, hoping that you think you're doing us a favor. That's what he's hoping. He's just hoping to throw those numbers up there so somehow you're going to give some small fraction, thinking: "Oh, my gosh. What a good deal. We're only going to give them, you know, two percent or one percent" or whatever the number is. Don't fall for that. You have to analyze the damage testimony based on the instructions the judge is going to give you. That is, they've got to be reasonable and they can't be

speculative. Mr. Meyer fails on both counts.

I'm sorry that I talked so fast and gave you so much information, but I again appreciate your attention and your patience in serving on this case. Thank you very much.

THE COURT: All right. We will take a 15-minute morning recess. Court will be in recess for 15 minutes.

(Recess taken at 10:55 a.m.)

* * * * *

(In open court with the Jury present.)

THE COURT: Good morning, again. Please be seated. And we'll proceed directly to the argument of VantageScore LLC as given by their counsel, Barbara Berens.

Ms. Berens?

MS. BERENS: Thank you, Your Honor. Again, like the other lawyers, I want to thank you all for your time, your attention, in a case that has been, I'm sure, has been more than you ever wanted to know about an industry that I didn't know much about before this case started.

My client is VantageScore Solutions LLC. You heard a lot about the VantageScore. You didn't hear very much about what my client actually does. Ryan, will you pull up slide number 2. VantageScore Solutions LLC is owned by the three credit reporting agencies. You've heard about that.

VantageScore does not sell scores. That is undisputed. Ms. Kramers-Dove testified about that. Various other witnesses both from TransUnion and Experian made clear that VantageScore Solutions is not in the business of selling any sort of credit score.

What VantageScore does is principally own and further develop the intellectual property or algorithm that is known as VantageScore, and it makes sure that that model continues to perform over time, and VantageScore Solutions

people go out, and they educate certain constituencies about the VantageScore.

And those constituencies include regulators, rating agencies, consumer groups, to explain what the VantageScore product is, but there is no direct consumer sales. Slide 4, excuse me, please, Ryan.

What happens is, the VantageScore Solutions entity licenses its algorithm to the three credit reporting agencies, and Equifax markets the score only to lenders, and then TransUnion and Experian market it both to lenders and to consumers, and that is how the score is brought to the consumer arena.

Now, I want to talk to you a little bit about marketing of VantageScore because I think it's significant that you have not been shown one web site, one advertisement, one commercial, one banner ad that is VantageScore Solutions' own product.

Instead, what you have seen are several different screen shots from the TransUnion and/or the Experian web sites, and again, these are the two outlets for the sale of VantageScore to consumers. And, Ryan, I would like you to bring up the Experian web site, which is in evidence. It is slide 18.

I think I showed you this in my opening. This is one of the two examples of web site sales of the

VantageScore, and again, I pointed out in the opening how the VantageScore not only uses numbers, but it also uses corresponding letter grades, and I would encourage you to look at this exhibit, which is Plaintiffs' Exhibit 1126, when you go into your room because I think if you look at this document carefully, you'll see that 501 to 990 never appears on this web site.

Now, I would like, Ryan, for you to show the TU web site, which is slide 13. Again, this is the TransUnion site that sells the VantageScore, and again, please take a careful look at that. This is Plaintiffs' Exhibit 1209. I think one significant thing about this particular exhibit is in his cross-examination of Mr. Danaher, Mr. Larus actually used this as an example of how a score can be described with clarity, and, again, these are the two outlets for the sale of the VantageScore score.

Slide 4, please, Ryan, or excuse me. 8. Now, we have all heard about 300-850. VantageScore, 501 to 990 with a corresponding letter grade. So from 901 to 990 is an A. I think you've heard a lot of testimony about how scores are chosen, scoring ranges are chosen, and I would like you to think about the evidence that came in about why was the 501 to 990 chosen?

I think one of the first things that's important to consider is that the scoring range for VantageScore was

chosen before the patent and trade office, the PTO, awarded trademark protection to 300 to 850. Ryan, slide 46, please. I think you heard a lot of evidence about 0 to 100 and that it was a recommended range for the VantageScore.

You might be wondering, well, why didn't VantageScore Solutions, why wasn't the range the 0 to 100? I wanted to point out on this time line, it was a very brief period of time in which that score was under discussion. I think there was some e-mails, and the exhibit number is cited on here that talk about the 1 to 100 range, and that was around October of 2005.

And then there were some discussions about 0 to 999, and those, again, were brief. If you look at the period of time, we're talking about a time range of less than a week, and by November of '05, again, almost five months before the PTO granted the trademark in 300-850, the VantageScore had been settled on at 501 to 990.

So, again, you've heard a lot about notice and when there was notice given and when the TM mark was started being used by Fair Isaac for purposes of the 300 to 850. All this was occurring before there was any trademark issued.

Secondly, I think you've heard a lot of testimony from witnesses about why a three-digit range is the most desirable, and you heard testimony. That's one reason why

the 0 to 100 was not chosen. I think I talked in my opening about the notion of granularity, and I thought both Mr. Christiansen and some of the others, Mr. Oliai, they talked about how when you're developing a credit score, what you're trying to do is predict future human behavior with a number.

And you need a certain range so that lenders can be making decisions about creditworthiness with enough detail to make decisions that make sense for their portfolios, and a range of 0 to 100 doesn't do it because there is not enough numbers, not enough granularity, between the 0 and the 100.

The same thing with a four-digit range. You heard testimony about how theoretically a score could have five digits, six digits, but from a practical market acceptance standpoint, a four-digit range I believe as Mr. Christiansen again testified to, you're not getting enough spread over a bell curve.

If you only have 50 people that are falling within a particular number, it's not enough, again, for the lenders to be making a decision about whether somebody is creditworthy or not. Also you've heard a lot of testimony about how the three-digit scoring range really is the industry standard. So VantageScore did go with a 501 to 990 range.

Now, Fair Isaac's claim against VantageScore essentially boils down to, because there is an overlap between 501 and 850, that VantageScore Solutions is somehow infringing on 300-850, and I would challenge you again to use your common sense and think about that.

Ms. Kramers-Dove said that the 501 to 990 range, she agreed with my statement that it only describes VantageScore and the output of its algorithm. You have heard a lot of testimony and a lot of argument about what is descriptive versus trademark use. Again, even in the one web site, the Experian web site, 501 to 990 never even appears as a description, much less as a trademark.

So I would encourage you when you're looking at the evidence to see that, again, 501 to 990 is using, is being used merely as a description. Finally, exhibit or excuse me. Slide 10, Ryan.

There was a lot of testimony that the reason the 501 to 990 scale was chosen was because it tracks the academic scale, and you've heard a lot of testimony about consumer confusion, and what better way to explain to a consumer in very few words about how they're doing from a credit standpoint if they look at their VantageScore and they see, well, we're in the A range.

We know what that means. You know if you're in a C range or in a D range. It has some independent meaning

to you. So one reason why the 501 to 990 was chosen was to track the academic scale. Now, Ms. Kramers-Dove did admit in cross-examination that Fair Isaac is not claiming every number as a trademark between 300 to 850. Could I see slide 7, please, Ryan.

So, again, when you think about overlapping and whether VantageScore's overlapping range constitutes some sort of infringement, think about Ms. Kramers-Dove and the fact that she said, no, FICO is not claiming a trademark in 501 or 502. They're claiming it in the phrase 300-850, and use your common sense to decide whether VantageScore's overlapping range is an improper use of those numbers.

I want to talk a little bit about consumer confusion, and again, I'm going to focus on the TransUnion and Experian web sites because, again, that's where the VantageScore is distributed. Ryan, will you pull up 14, please.

This is the TransUnion web site. I showed you this briefly before, and I have highlighted some things so you can be thinking about those. First of all, it says, this is the VantageScore credit scoring formula. 15, Ryan? VantageScore credit scoring is mentioned. 16? Again, it's using the number combined with a grade.

This is a sample score, but again, it's a B, so it gives the consumer some indication of where they might

stand in relation to others, and 17? Here it just says, the numerical score ranges from 990 to 501 equaling grade ranges from A to F.

Here they're not even using 501 to 990, and again, they're equating it with the grading system, and you heard testimony about what a trademark use is, and you heard from Mr. Anderson that uses of like 300 to 850 are not trademark uses. Again, question whether 990 to 501 is a trademark use in the context of the TransUnion web site that markets VantageScore, and also query whether a consumer would be confused by this.

Now, Ryan, could I see 19, please. Again, Experian's web site. Examine it carefully. It never even uses the phrase "501 to 990." What does it do to distinguish itself and tell a consumer what they are purchasing?

First, VantageScore for businesses. Slide 20. VantageScore, and it shows service mark. 21. The VantageScore scale. 22. Your VantageScore number. 23. Lenders using VantageScore. 24. VantageScore when you're clicking on it to see if you want to learn about your VantageScore.

Next slide. National VantageScore averages. Next one, Ryan. VantageScore mentioned again, and finally, the range coupled in segments with the academic grades. I

would ask you, use your common sense. Would a consumer be confused if they went to this web site to buy a VantageScore?

Another, I think, test of the consumer confusion relates to what would you get if you actually purchased a VantageScore, and I don't think this was shown to anybody, but I wanted to spend a little time on this, too. Ryan, slide 28, please.

This is an actual example of somebody's VantageScore. This was purchased from the Experian web site. Next slide. Again, it says at the top, Experian and then VantageScore with the service mark. Next one, Ryan. It's an Experian VantageScore report. Next one. VantageScore is generated.

Next one. VantageScore from Experian. Next. This VantageScore is based on. Next. Your VantageScore is 990, I wish, on a scale of 501 to 990. Next. A VantageScore summary. Next. About your VantageScore. Next. VantageScore is. Next. What your VantageScore means. Next. What factors lower your VantageScore.

Next. Your risk grade is A. Next. Your score currently falls into a risk grade category of A. Again, think about whether an average consumer purchasing this score would be confused about what the source of this score was. I would suggest that the answer to that question is

no.

I want to talk to you a little bit about some of the special verdict questions and how I believe the evidence would suggest answers. I'm not going to spend any time on secondary meaning. I think some of the other attorneys already have spent a lot of time on this, but I did want to spend a little time on question number 2 of the special verdict form, which you will be answering for each of the defendants individually.

And you've heard a little bit about, did the phrase "300 to 850" acquire secondary meaning before defendants' allegedly infringing uses? And I would like to talk about, again, slide 46. Again, this range was chosen before a trademark was issued, but I think another factor you can consider in terms of secondary meaning is Mr. Johnson's survey, and I know you've heard a lot about the surveys.

But I just wanted to call attention to the fact that Mr. Johnson's survey, which you can accept, reject, you make your own decision about it, but the date of that survey was in September of 2008. And Mr. Johnson did ask questions about the range of 300 to 850, and I'm sure you'll remember how small the percentage, I believe it was only 2 percent, of the folks who even knew what a range like that referred to.

So this is almost two years after -- excuse me. Three years. I can't do the math -- three years after the VantageScore scoring range was chosen, and still in this survey, secondary meaning was not established. Question 3 has to deal with consumer confusion, and I think we went through that with the web sites.

Again, use your common sense to decide whether the average consumer would be confused about the source of the VantageScore when purchasing. I'm not going to spend any time on the functional defense. I know Mr. Remele spent some time on that. I did want to spend a little bit of time on fair use, which is a defense that VantageScore is also asserting, and again, it is a bar to any sort of liability, and it is question 5 of the special verdict form.

It has three elements: Did a defendant use 300-850 otherwise than a trademark? I would argue that VantageScore Solutions has never used 300 to 850 as a trademark or 300-850, nor was any evidence introduced that VantageScore Solutions has ever used any sort of seal logo.

Secondly, did the defendant use 300-850 fairly and in good faith? The evidence, I believe, shows that the only time VantageScore is using its scoring range is to describe the output of its algorithm, and that is a statement to which Ms. Kramers-Dove did agree. And, again,

it goes to the descriptive use.

If we are using our mark and our scoring range only to describe the output of the algorithm, we are entitled to the benefit of that fair use defense. I want to spend a little time on fraud on the PTO. May I have the first slide, Ryan, on the fraud on the PTO.

I know you've heard a lot of testimony about this, and again, you have to use your common sense, but I wanted to draw your attention to several things. First of all, this is what Fair Isaac in its submission to the PTO on February 28th, 2005, what they told the PTO.

300-850 is the credit scoring scale only for applicant's credit bureau-based risk scores and not for other types of credit scoring products that the applicant develops or even other credit bureau-based risk products that competitors develop. That is what they told the PTO in February of '05.

But what did Fair Isaac know? I want to show you a couple examples of that. First of all, other side of the slide, you've heard a lot of mention of Mr. Watts who did not testify in this case, and this is a quote of his from a newspaper article on July 29th, 2001. "Many other companies have developed their own scoring systems, although a ranking from 300 to 850 is used by most systems."

Next slide. Another example of what Fair Isaac knew. This is an internal e-mail, Fair Isaac e-mail from Andrew Jolls, and again you'll recognize his name. His video deposition, excerpts were played. November 25th, 2003. "Experian is offering its PLUS Score, a credit score exclusively for consumers. The scores use a scale of 300 to 900 and look similar to the FICO scores that banks buy from Fair Isaac Corporation."

Again, 18 months before this statement was made to the PTO. Next slide, Ryan. Here is a statement made about TransUnion on December 16th, 2004, and again, this is an e-mail from Craig Watts to Cheri St. John, Keri Kramers-Dove and others, and I'm sure you'll recognize Cheri St. John's name as the person who had put in the affidavit to the PTO.

TransUnion has announced a promotion to identify consumers who have the, "Perfect credit score of 850, but they're not referring a FICO score. TU's consumer site, TrueCredit.com sells an imitation score to consumers, not FICO scores." Now, again, you're going to have to decide whether those constitute fraud on the PTO or not, and those particular questions related to defendants' counterclaims should be questions 9, 10 and 11 of the special verdict form.

In summary, I would encourage you to use your

common sense and find that 501 to 990, coupled with an academic grade, does not constitute a same or similar mark and find that VantageScore Solutions LLC did not infringe on 300-850.

Thank you.

THE COURT: All right. We'll take another in-place standing stretch break.

(Standing stretch break.)

(In open court with the Jury present.)

THE COURT: All right. Please be seated. Because the plaintiff has the burden of proof. They have the opportunity of giving the last argument. We will now proceed to the argument of Fair Isaac as given by their counsel Robert Schutz.

Mr. Schutz.

MR. SCHUTZ: Thank you, Your Honor. Ladies and gentlemen, I, too, would like to thank you on behalf of Fair Isaac, Renee Jackson, corporate counsel, and Keri Kramers-Dove, who has been sitting here the whole time, and you've had a chance to hear testify.

You know, I've been doing this for a long time, and I sure hope that your experience hasn't been painful in any way. I believe life is the collection of stories, and a week from today, probably most of you will be sitting

around a table carving up a turkey or a ham or something like that, and you will be without a doubt the premier experts inside your houses at the table on credit scores, and so you should have some good stories to tell about that.

At the beginning of the case, I said that a couple of central things, that this case was about consumer credit scores and how they're marketed, and it's a case about informed consumer choice, and that hasn't happened. And in my opening, I also had a top ten list. Well, I have carved that list down a little bit.

I now have a top nine list, and I'm going to use that to walk us through the evidence here, and of course, I have here, like my opponents on the other side of the courtroom, I have a limited amount of time. I can't talk about every piece of evidence, but I am going to cover some highlights.

So what I have constructed here is a top nine list, and it's the top nine myths perpetrated by the defendants in this case. Myth number one: You cannot trademark numbers. Of course, you can trademark numbers. If you could not trademark numbers, we wouldn't be here.

You will have the definition from the Court on what a trademark is, word, name, symbol or device or combination thereof that indicates the source of the goods

or services even if that source is generally unknown. I will come back to that a couple of times.

We don't have to be McDonald's. We don't have to be Kentucky Fried Chicken. We don't have to be Apple Computer. We don't have to be any of the famous marks that have been used by, as examples of the defendants, and people do not have to associate 300 to 850 with Fair Isaac. They only need to associate it from a single source, even if they have no idea of the name of that source.

The defendants' real complaint here is that they don't think that we can trademark a score range, but even the defendants here acknowledge that you can have a trademark and a score range. Jeff, let's pull up Plaintiffs' Exhibit 975.

You will recall that Plaintiffs' Exhibit 975 is a contract, three-way contract, entered into in August of 2006 between TransUnion on the one hand and Fair Isaac and WAMU, the other two parties, and let's take a look at two sections on this screen. Let's look at 7.3.

And if we look at Section 7.3, we can see here that Fair Isaac has put in this that they have a 300-850 score range trademark. It's a registered trademark. This agreement was signed by Mr. Danaher, and there was never any, you know, correspondence, telephone call, e-mail or anything from Mr. Danaher that said, whoa, wait a minute.

You cannot trademark score ranges, nothing like that.

Now, let's go to the next paragraph, and here we have another provision that says, No party may use another's mark or company names in advertising or other promotional material without first obtaining the prior owner's consent.

So it's clear, a clear indication that we have a trademark on the 300 to 850 score range and a clear acknowledgment that, hey, you can't use it. You can't use it. Now, I'm going to be leaping ahead and back a little bit because some things I showed you are relevant to various things.

This acquiescence defense that we will talk about requires an affirmative act on our part saying, it's okay to use our marks. That's really what, you will have a jury instruction on that. Keep this in mind when we get to there.

Now let's go to Experian. We had a contract with Experian. The master contract was April, April 15th, I think of 2005, and there were a couple of addendums, and let's look at restated addendum number one, which is February of 2006.

And if we go to paragraph 5.4 here, if we go to paragraph 5.4, we can see that among a defined term here is a Fair Isaac optional trademark 300-850 TM score range,

score range, and this was, of course, at the time when we had filed our federal registration but had not yet been granted the registration. That's why it's a TM as opposed to a circle R.

You put a circle R once you've got the trademark registration from the patent office. The other thing that is very clear, not in dispute, is that when we were prosecuting these applications before the Patent and Trademark Office, it was clear that it was a score range that we were seeking trademark protection for.

There is no doubt about that. Mr. Anderson acknowledged that. It's not part of any defense on their part that we have somehow, you know, pulled the wool over the eyes of the people at the Patent and Trademark Office. It was always up front that what we were trademarking was a score range.

What the issue boils down to at the end of the day is, yes, you can trademark numbers, and you can trademark score ranges. It's whether this particular trademark score range has achieved secondary meaning, and that's going to be the next topic I talk about, but before we move into that, the next myth the defendants have tried to perpetrate here, I think it important to refresh our recollection of why trademarks are important.

Consumers rely upon trademarks to signal to them

certain characteristics or qualities about goods they're purchasing. I have used the example of Coke and Pepsi before. Coke lovers love the characteristic taste of Coke. Pepsi lovers love the characteristic taste of Pepsi so that when someone buys a Coke, they know what taste they're getting and vice versa with Pepsi.

One of the important characteristics of the FICO 300 to 850 is it's the score that lenders use. It's the score probably that most lenders use or it's the score that the majority of lenders use. I think that's really undisputed in this case.

It's one of the essential characteristics of the score, and so when somebody buys that score, they can rest assured that maybe not every lender uses it. Maybe my lender might not use it, but most lenders use it, majority of lenders, 75 percent of mortgage applicants. You'll have the evidence back there, and it's replete through all the documents.

And, again, people do not need to know that the 300 to 850 product comes from Fair Isaac. I would submit that before this trial, most of you might not have known that Crest toothpaste comes from Procter & Gamble, and you might not have known that Haagen-Dazs ice cream comes from General Mills.

Let me just, a couple of other things on the

lender's use issue. Okay? Let's look at Plaintiffs' Exhibit 893. Plaintiffs' Exhibit 893, this is a document from 2004, so one thing to note about this 2004 document, and you will recall the testimony of Keri Kramers-Dove that trademarks were applied for in February of 2004.

And this was early in the year, certainly before mid 2004, when there is some testimony at least by Experian that they started using the range that we think infringes, you have pretty prominent use on this web site of 300 to 850 in one of our applications. It's prominent, the seal, and also you see here, most lenders base approval on that.

You've got a direct connection between the 300 and 850 trademark score range and lenders, but you don't have to take our word for it. Let's go to Plaintiffs' Exhibit 1157A-68. This is an Experian document. This is the web site where Experian sells the FICO score. Remember that we've got this arrangement that they do have this, what they referred to, as the other score -- I'm sorry -- TU, we've got the other score range. TU has got two score ranges.

Here you can see here there is a clear reference here, second bullet point, that the FICO score range is 300 to 850, and I think it's on the second page, Jeff, that there is the reference to lenders. Okay? So here you can see how lenders see you. Majority of lenders use FICO

scores, and this is from TransUnion, so even TransUnion in their public face to the world about the FICO score says that.

One final point on this before we move to the next factor, next myth, we do not have to use a TM or an SM or a circle R to have trademark rights. Would it have been a good practice to have done so? Probably. We didn't do it. It's not legally relevant, and I'll talk about the notice issue in a few minutes, but let's move on to the next myth.

Myth number two. Myth number two: This case is about lender scores and overlapping score ranges. That's the myth that the defendants are trying to perpetrate here. It's not about lender scores. It's about consumer credit scores. We are not seeking damages. We are not seeking to stop any behavior in the lenders' space. The world will not come to an end.

It's about four scores, specifically: The FICO 300 to 850 score, the Experian PLUS Score, the TransUnion TransRisk score and the VantageScore. That's what this case is about, and it's not about overlapping score ranges. It's about whether they have marketed their product to consumers, each of their respective products, using those score ranges we've alleged infringe in a manner likely to cause confusion as to source, sponsorship or affiliation.

That is the legal test, not that it actually caused confusion, although it certainly did. We'll talk about that evidence, but whether they're marketing their product, using what we allege is an infringing score range, is likely to cause confusion about source, sponsorship or affiliation.

Lenders, of course, are not confused. Even if they had used 300 to 850 in the lender market and there is some reference to some, perhaps, in scores very close to this in the lender market, lenders know exactly what they're getting. They're not confused at all.

Somebody walks in and says, I've got a score and the range is 350, and it's from Experian or some XYZ company. They know whether it's a FICO score or whether it's not. Lenders know exactly what they're buying. There may, however, be some relevance to lender scores in this sense:

You heard two third parties come in here from Choice Point and Lexis-Nexis, and they gave testimony. What I would submit is the most interesting about their testimony is that they, those two witnesses came in here and said, we compete with Fair Isaac. We compete with Fair Isaac across a range of scores.

So they compete with Fair Isaac, but they did not have to copy our score range to compete. All right? I

found that very interesting, that they did not have to copy to compete, and we're going to get to copying in a minute.

Myth number three: 300 to 850 has no secondary meaning. All right? And again, what the defendants are trying to say is, and Mr. Remele put the slide up, would you recognize Kentucky Fried Chicken. Would you recognize McDonald's? Would you recognize all these famous marks and then 300 to 850. That's not the test. The test isn't whether I recognize it, the judge recognizes it, they recognize it or you recognize it.

The test is whether a prospective purchaser would associate it with a single source, not that it's associated with Fair Isaac, but with a single source. Remember the testimony from Mr. Anderson of the PTO? 100,000 trademarks are registered every year. 100,000.

Yes, we all know famous ones, but for those trademarks registered in smaller products that don't have that kind of market penetration and the like, the issue is whether prospective purchasers of that product. It's not whether somebody doesn't care, would never purchase a credit score, doesn't give a darn about credit scores would associate it. It's whether a perspective purchaser would.

The evidence that you will be able to consider. The judge will give you instructions. There is a list of things you can consider, and I would like to talk about

some of them. First, intentional copying. The second fact you can consider is actual confusion. Third factor is sales and extent of use, and the fourth factor is exclusive use of the mark. There are some other factors, but I think those four are highly relevant.

Let's start with intentional copying. All right. Why, you might ask yourself, is intentional copying something you should take into account about secondary meaning, and it makes perfect common sense. If someone is picking in this case a score range and they've got the whole broad spectrum of options to choose from but they choose the score range of the market leader of a recognized one, they're doing so because they know it has secondary meaning.

They know that people have associated that particular score range with a single source. That's why people copy things. That's why people make fake Rolexes. That's why they make fake knock-off products. All right? They copy because they know that that's a way maybe they will be able to fool a consumer into purchasing the knock-off product. That's exactly why copying, intentional copying, is one of the factors that you can use in assessing whether there is secondary meaning.

Here's what we're going to do next. We're going to look at some of the copying evidence, and one of the

things that we can, that we're going to do in this case is, we're going to go behind closed doors, and we're going to look at what happened behind the closed doors in the VantageScore development, what would happen behind closed doors at Experian, and what happened behind closed doors at TransUnion, and we're going to apply what I call Ron's mom's rule.

When I was a boy growing up on the farm, the wisest person I knew then and the wisest person I know today is my mother, and she told me when I was young, listen to what people say, but watch what they do because actions speak louder than words. So let's go behind closed doors, see what the defendants did back then, what they wrote down before there was a lawsuit, before they hired lawyers to get involved to spin some facts.

Let's start by looking at Plaintiffs' Exhibit 102. This is in November, and we're going to start looking at the VantageScore. We're going to go behind the scenes at VantageScore, and here's why we're going to start there because VantageScore, remember, is a joint venture between all three of the credit bureaus, including two of the defendants in this case, Experian and TransUnion.

So let's take a peek behind the closed doors at VantageScore in November, November of 2004, and here we've got a meeting, and there are some names up there at the

top, at least a couple of them. Mr. Wiermanski and Mr. Hellinga are people who testified in this case by video deposition, and FICO was mentioned.

Here's what they say: Replace FICO anywhere they appear. B2B and consumer, everyone would see the same score. So this is the mindset. This gives you some background mindset of these people. Okay? They want to replace us. Let's now go to Plaintiffs' Exhibit 34.

Plaintiffs' Exhibit 34 is a March 31st, 2005, memo to Keri Williams, and you know, his title is up here. I think he has been mentioned a couple of times. Let's look at second page I think it is, Jeff. Here this memo, there is this paragraph entitled calibrate to FICO, and there is a reference to the TBS score.

And recall that tri bureau score, and before VantageScore had the name VantageScore it was talked about as the tried bureau score or project Trident, and ultimately that's what led to VantageScore, but here we've got, again behind closed doors before, this is nonspin stuff. Okay. These are just their words.

The TBS score would only conform to the current FICO range by accident. The bureaus could provide the TBS scores to customers on a new and clearly defined scale, along with a conversion table to FICO scores. Alternatively, the TBS score could be transformed so that

it appeared to be the on same scale as the FICO score.

These people know exactly what they're doing. These are people that have been our partners. That's another thing to keep in mind. I will talk about this a little more. We have been in business with these people since 1989 when we first did our first bureau score. They know about us.

All right. We have taken their data, run it through our algorithm and outputted a score. They know about the FICO score range. They know about how hard Fair Isaac had worked to get its position in the marketplace, and they clearly also know that there is an option out there when they're developing a tri bureau score. New and clearly defined scale.

Look at 501 to 990 in a couple different ways. I would submit, it's not a clearly defined scale different from the FICO score. Now, let's go to jump ahead here a few months to October of 2005. Let's look at Plaintiffs' Exhibit 44.

This is again project Trident, ultimately led to VantageScore, and on this page, I think it's internal page 10, score scale and range, 1 to 100, and we have got some pros and some cons. What are the pros? Consumer friendly. 0 to 100 actually conforms much more, I would submit, to an academic scale than 501 to 990.

The schools that I grew up in in the small farming community when I was a boy had 0 to 100, not 501 to 990. So it's consumer friendly. It is regulator friendly and bullet point three is very important. Product distinction. Product distinction. Nobody would be confused between a credit score product that had a range of 0 to 100 with one that had a range of 300 to 850.

So they clearly know the benefits of going there. Meaningful outcome? What does meaningful outcome tell us? Well, there is enough granularity to provide a meaningful outcome for lenders to use that score. Let's now go to Plaintiffs' Exhibit 338.

This is an e-mail. Mr. Oliai is part of this e-mail. He testified in this case. Among our team we refer to Oliai as Mr. Perfect Memory Man. He came in and testified about 30 plus credit scores from memory and then drew this nice chart of all these different credit scores.

And the most interesting part of that, of course, is lots and lots of scores all related to lenders, all kinds of options they could have picked when they decided to launch the new TransRisk score or the Experian score, and they didn't pick those. They picked our range.

So what do we have here? A couple of things. First of all, we've got use of score, and this point is a little bit esoteric, but I do want to make it. Use of the

score, and he's talking here about the VantageScore, and the point that this is making is, the VantageScore range output is actually something they considered to be proprietary.

501 to 990, nobody else can use that because the discussion here relates to, you will see this in a whole document, whether one of the parties by themselves can use that score range on some other product, and we also introduced into evidence that might be Plaintiffs' Exhibit 30, I'm not going to pop it up here, but it's the VantageScore IP agreement.

And you walk through the definitions, clearly the score range they consider to be protectable property in that agreement. There is another page here, Jeff. Let's go. So the scale. They talk about the scale. Extensive discussion of pros and cons of mimicking currently used score range versus different score range.

Well, the currently used range is the FICO score range, and they're talking about mimicking. All right. You know, is mimicking a word that means you're doing the right thing? I would submit not. I would submit that these people knew exactly what they were talking about when they talked about should we mimic the FICO range.

The reason, of course, they want to mimic the FICO range is that we had obviously established ourselves a

leader in the lender market, and we were the first to launch a FICO score to the public in March of 2001 with myFICO.com, and this was their discussion of whether they in essence could figure that out off of all the work that we had done.

Let's continue here. Let's now go to Plaintiffs' Exhibit 22. It's November 16th of 2005, and let's go to internal page 25. Would you enlarge that, Jeff? Let's just look at a couple of things here. At this point, they had decided to go with 501 to 990, and what do they say?

Easier adoption and implementation if score scale is similar to others in the market. Well, who is the other score in the market? That's us. Okay? And then there is one on difficulty with consumer adoption if new scores are generally lower than existing scores. I think that goes to the 0 to 100. People might not be crazy about having a 78 when there is a different scale, but that's another issue I'll address here.

Look at the bullet point that says, Cannot mimic competitor scores exactly. Well, let's just think back about this. So they acknowledge you can't mimic them exactly. Well, why can't you mimic that them exactly? Well, that would be wrong somehow, but we know that's exactly what TransUnion did, and we'll look at their -- and TransUnion is part, they're one-third owner of this.

So people know you can't copy exactly. They think that it's okay to copy close because that's what this gets to. Let's look at the next bullet point. The concept of setting a new standard is valuable but too many hurdles. So the concept of having a completely different score range valuable because why would it be valuable? What does your common sense tell you?

Brand distinction. No possibility of confusion, whether it's 0 to 100, 0 to 300 or 1,000 to 2,000 or 1,000 to 1500. You would have the ability to set a new standard and everything else, but too many hurdles. Well, what kind of hurdles might there be? Let's just think about this. Did Fair Isaac get to where it is today in the lender market overnight? Of course not.

Of course not. Started in 1989 with the first bureau score. Added other scores in the early nineties, and all of a sudden after 20 years, they're an overnight success. Took Fair Isaac a long time to get to that spot. All right. The defendants wanted to shortcut that. They wanted to shortcut getting substantial market penetration and establishing themselves in the market.

The best way to do that was to mimic or copy the scores. Let's now go to Plaintiffs' Exhibit 505. This is out of Experian's files. Okay? And what we see here, they say FICO score range is 350 to 850. Apparently a typo. We

want to keep it close, but not exactly like FICO's.

And of course what did was, they went ahead with the suggested change which was to go from -- you have to remember the score was 300 to 900, and they went from 300 to 900 to 330 to 830. Well, why would they do that? Well, we see, they want to keep it close but not exactly like FICO's.

The score they actually sell to lenders, there has been evidence about this, is the 300 to 900 score. Mr. Oliai, Mr. Perfect Memory Man, came in and testified about this whole laundry list of the scores. They didn't pick any of those scores. They picked what was in essence the FICO score range, but not quite but almost exactly.

Let's go to TransUnion. Now let's go to Plaintiffs' Exhibit 201. These are, this is a list of TransUnion risk models, and, Jeff, you could highlight 150 to 950. The TransRisk model that they use in the lender market is 150 to 950. It's not the 300 to 850 that they use when they're selling to consumers. All right?

There is no possible rational explanation for why when they're out there with their bag of credit scores going into banks and lenders and say, here's our score, it's 150 to 950, why they couldn't use that same exact score range when they're with consumers.

In fact, you would think they would say,

TransRisk credit score has a range of 150 to 950, exactly what lenders use when they use a TransRisk score, and that's what you Mr. and Mrs. Consumer should buy. Instead they decide to knock off our score range.

Let's go to 326. This is an e-mail that you have seen before, and it's Mr. Danaher is in the loop here. You can see it's from Justin Depow saying I think we should use the range 300 to 850 to be completely compatible with the FICO scale, which is what we are trying to mimic.

Mr. Danaher sent back in about 45 seconds. Clear copying, clear mimicking. Thought about it for 45 seconds, even though in the lender market we're going 150 to 950, just copy it when we're going in the consumer market.

Let's go to Plaintiffs' Exhibit 647. I just highlight this to show there are consumers out there -- highlight the top of that, Jeff -- some consumers out there that refer to the TransRisk score as the fake-O score. They know, some people, consumers once they find out it's a fake-O score, and they know that inside of TransUnion.

Okay. I want to move on to another factor that you can consider in secondary meaning. So we're on the myth of there is no secondary meaning, and what we have looked at is intentional copying. I want to look at extent of sales of myFICO.

Remember that or FICO scores sold, and they were

sold through the myFICO.com web site. Remember it was launched in March of 2001. Let's go to Plaintiffs' Exhibit 925. Plaintiffs' Exhibit 925 is a memo to the board of directors, and this is very shortly after the launch. The launch was in March 19, 2001. This is May 1, 2001, so about five and a half to six weeks, and how was this perceived?

This is one of the factors that you can take into account, and what does it say? Volumes: Initial response has surpassed expectations. We had over 20,000 orders by the end of the first day, and remember, every single one of these sales was of a score with a range 300 to 850, and that range was clearly set forth on the -- it's been consistent that the range has always been the same.

And an offering of just shy of 100,000 orders by the end of March with only 13 days of service. It talks about gross revenues of 583,000. Then it goes on to say, So far the volume can be directly related to press coverage. See information below, and let's go to that. So what has been the press coverage?

Major media public relations blitzed. Leveraged a wide variety of consumer media outlets. Is this the first time that Fair Isaac has by design embraced direct to consumer market and media attention. This was their first foray into the direct to consumer market.

It says, This has also been the most positive consumer media portrayal Fair Isaac has ever received. The more notable coverage, not all of it, just the notable coverage. 300 plus local and regional TV news programs covered the story. Over 200 plus newspapers covered the story, including papers as you see here, like the New York Times, the LA Times, Washington Post and Wall Street Journal, including, you know, well-known columnists Ken Harney and Jane Bryant and then also on national public radio as well. Okay?

Go to the next page, Jeff. Then some additional stuff. Web portals, a lot of web portals covered it. Microsoft Network, Wall Street Journal and Trade Publications. You will recall the testimony of Ms. Kramers-Dove, and I've got the number I think exactly here, that through 2003 the sales of these 300 to 850 credit scores on myFICO, through all the channels, which would be myFICO,and remember we had a partnership with Equifax and one with TransUnion.

But through all channels had sold 5.3 million scores, and then through spring, I think May of '05, there was a press release. I won't bother flashing it up where they sold ten million, and so it was a very successful product, and each time it was sold, it was sold with that score range.

Exclusive use. Another thing that you can consider. No one else ever used 300 to 850 until TransUnion came along and copied it. So we did in fact have exclusive use of that until they came along and copied the mark. Another thing you can consider is survey evidence.

The only survey on secondary meaning is by this fellow named Johnson. His survey, of course, is fundamentally flawed. You will remember, and let's just put up here as a demonstrative exhibit this 1507. This is the question that was posed by Mr. Johnson, and I think it is worth taking a look at this a little bit.

It says, As you may or may not know, a credit report often contains a credit score. So right away we're talking about reports and scores. Then he says, if you saw a credit report, not if you saw a credit score, if you saw a credit report containing a credit score which used a range from 300 to 850, would that or wouldn't that tell you anything about who or what company or organization was responsible for creating or producing the credit score used in that credit report.

The problems with this question are almost too many to list, mixing up reports and scores. And as we know, credit reports are produced by everybody but Fair Isaac. Okay? We don't produce credit reports. Experian,

TransUnion and Equifax produce credit reports.

So necessarily, the right answer to this question is, I wouldn't necessarily know. It's certainly not a single source because it comes from all kinds of sources. Mr. Jacoby, he's the professor from New York came into this courtroom as a critic. Apparently, he's the smartest guy in the world because even a lot of federal judges who disagreed with him over the course of his testimony are just plain wrong, according to his testimony.

Even he, however, said this is a double or triple barrel question in response to seeing this when Mr. Larus put that to him. That's not surprising. This is a survey that was conducted by the defendants. I would submit that this survey was clearly designed, it's just the questions, to achieve the result they got. The result they got was no secondary meaning.

It was clearly designed to do that. This isn't the first time they've done that. Let's look at Plaintiffs' Exhibit 665. Let's go back behind closed doors again. Let's go back behind closed doors to TransUnion and see what they have done here. Here he have got some e-mail exchange involving Lucy Duni, and subject. Okay. Look at the subject line: New Roper survey to prove low awareness of FICO score.

Okay? Think about this. Just think about this.

Not, we're going to conduct a survey, a Roper survey to see if FICO has some awareness. It's, we've decided how we want to rig this survey. We're going to rig this survey to prove low awareness. Go down toward the bottom of the e-mails. Okay? I'm sorry. Yeah. So what do we have here?

Hello, and it goes on. Emily put together some potential survey questions. We want to ensure that the final outcome shows very low awareness of the FICO name. Now this happened to deal with the FICO name, not 300 to 850, so that we can share these results with Providian.

They wanted to sell their product to Providian and show to Providian how FICO has low awareness, and that's what they did behind closed doors, and then they come into this courtroom with an expert with a survey that is questioned as double or triple barreled by another expert, and lo and behold, it doesn't show secondary meaning.

Should we be surprised about that? No, we should not be surprised about that because Mr. Johnson's survey, I would submit, was rigged at least as bad as this Roper survey that they talked about in Plaintiffs' Exhibit 665.

Let's now go to myth number four. Myth number four: Consumers are not confused. The test, again, is not whether -- the test, rather, is whether consumers are

likely to be confused about source, origin or sponsorship, not whether they're actually confused, but whether they're likely to be confused and prospective purchasers. Okay?

And you will have a whole laundry list of things that you can consider, but as we look at the confusion issue, let's take a look at what the defendants are doing, and then let's look at the confusion issue. Let's start with some web shots from TU. Let's look at Plaintiffs' Exhibit 1198.

Plaintiffs' Exhibit 1198, here we see a screen shot, I would submit, very prominent use of 300 to 850. No disclaimer. You recall some argument by TransUnion's counsel about what they did was, they did a disclaimer. No disclaimer here. Let's go to Plaintiffs' Exhibit 1201. Again, similar. Prominent use of 300 to 850 in marketing the product.

1125. If you walk through 1125, you saw some of this in damages, here you see again the bar graph showing 300 to 850. Let's look at a couple of Experian web sites. Let's look at Plaintiffs' Exhibit 1124. Here, you see if you scroll that up, Jeff, very prominent use on a National Score Index of 330 to 830 down there at the bottom, and I'll take the next one, Jeff.

And let's look at another Experian web site. This is from consumerinfo.com, and here we've got pretty

clear use of 330 to 830. Here the score range, now, what's also interesting, and you can, we'll touch on this a little later, but clear ability to use a different scale. Clear ability to click on this button and see what you look like on a 0 to 100 scale.

All right. And then it tells you about your PLUS Score, and let's look at a few things it says about the PLUS score. It says, the score is formulated using information in your file. Some of these exhibits will refer to your score, your credit score.

Remember when we had Mr. Williams on the stand. I showed him all those banner ads that said, the banner ads said what's your score, and I asked him, well, what score are they talking about, and he didn't know. He knew it was not the Experian score. He didn't know what score it was, and yet, that score drives people to these web sites.

You will see if you look at this web site, and we will look at another one in a second. You go through it and ask yourself, all right, they're using the score. Here's how they're marketing. They're using the score range, and they are, I would submit, you get to make this choice, submit clearly implied that the score they're using has the same characteristic that consumers associate with the FICO score that is used by lenders, and we, of course, know that the Experian PLUS Score is not used by lenders.

Let's go to, let's see, 285 a second here. Experian Exhibit 285, another one of their web sites. This is from CreditExpert. You go back to the page at the end here. You will see, again, use of -- you'll see in the middle here, you know, reference to the range, and then it talks about your PLUS Score explanation.

It says, your PLUS Score is formulated using the information in your credit file. Your credit score helps potential lenders, so they switch back and forth between talking about your score, your PLUS Score, all with the range, same page, close proximity here. This is the way they market the products.

I would submit to you that that's done in a way likely to cause confusion as to source here. Then they've got several sites that they use. There is another one called Q space. Let's see. EX 272. Let me get that. Just a second.

It's another one of the Experian web sites, and much like the other ones, it has the score range 330 to 830. Again, you can click a 0 to 100 scale. Discussions again about how credit scores are used in application processes, things of the like, and you go through this. I would submit that the marketing package they have talks about the score range in association with the characteristic that consumers have come to associate with

the FICO score.

All right. Another way that they advertise is through television ads. Okay? We're going to look at an ad that has been played before. We call it the "I'm thinking of a number," ad and just to highlight so you can pick up on it, the young man in the commercial says, I'm thinking of a number between I think it's 450 and 850, the important part of course is the 850.

This is for FreeCreditReport.com, which is one of Experian's web sites. They don't sell a score on this site that goes to 850. They don't. They spent money on television advertising that says I'm thinking of a score that goes between 450 and 850, and it's your credit score. It is an important number. FreeCreditReport.com. Why did they do that? What does your common sense tell you why they did that? They would want the people to recognize the 850 part of it because that's the FICO score.

(Videotape PX 425 played.)

MR. SCHUTZ: Now let's look at, now that we know what it is they do, let's look at the impact of what it is they do. Let's look at Plaintiffs' Exhibit 21. We'll start with VantageScore. Just one e-mail will show up. This is an e-mail to Barrett Burns, and you know Barrett Burns would be the CEO, and if you could highlight the paragraph here that says, you know, we did a VantageScore

interview today with bankrate.

And there is a discussion about a consumer who got an Experian VantageScore of 668. Went to see her mortgage lender thinking she would receive a prime rate, but of course, she didn't because the scale is slightly different, but she thought that, you know, the FICO score the lender received was only 574 and the consumer wanted to know why.

Points out that it makes a difference what is being done out there. Let's go to some other evidence. Let's look at Plaintiffs' Exhibit 462. This is an internal, again. We're inside behind doors at Experian, and they've got various call centers. This particular call center handles reports about inquiries, a lot about credit reports and scores that may come with that.

And it says here in the second bullet point about, it says, One in five callers has one or more questions about scores, and what are the questions? They include a range of stuff, how to get a score, general questions about scores including FICO. So some of these callers are calling in to the Experian web site asking about a FICO score. All right. Let's now go -- Jeff, I'll take this one.

Let's now go to Plaintiffs' Exhibit 433. All right? These are call scripts that Experian put together

to give guidance to their call center operators on how to respond to calls and e-mails. All right? And counsel, when they said that the confusion can't be general confusion, they're right about that.

The confusion has to be confusion related to the sale of the product. Can't be simply, I'm confused about credit scores. I have no idea what a credit score is. Can you help me out there? That's not the test. That's not the confusion that we have here. We have confusion that people think they got a FICO score when they bought something else. It's not general confusion. It's very specific confusion about they think they got the FICO score when they did not.

MR. MILNE: Objection, Your Honor. He is misstating the law.

THE COURT: Again, just like with all of the facts, with regard to the law, you are going to have to trust me to give you the law to apply. Don't trust any counsel's version of the law.

Let's proceed.

MR. SCHUTZ: Let's now look at what it is they say here with the PLUS scripts. All right? And the discussion here doesn't refer to any other score other than the PLUS Score and the Fair Isaac score. All right? All these other other scores that Mr. Memory Man Oliai

testified about, the 30 some scores, you won't find another one of those in this particular call script.

All right? So a couple of things. These are potential questions that we might look at. Let's go inside this document and look at a few things. This is entitled, this particular page is, PLUS Score is not the FICO score and a couple of things here.

Two take-a ways from looking at this document, and you know, there is this question in particular. It says, I want a refund because this is not a FICO score. The only reason somebody would ask a question and say I want a refund because this isn't a FICO score is because they thought they bought a FICO score when in fact that's not what they got.

Two things to keep in mind here, though. They clearly recognize that there is going to be confusion, and they're prepping their operators to deal with that. What do they say? Do they ever clear up the confusion, or is the guidance actually in some circumstances perpetuate that confusion?

So among the things that they, the guidance given here is, they say PLUS Score is not a FICO score. They say that. FICO is the company that developed it. Experian developed the PLUS Score. Think of FICO and PLUS as a couple of the many brand names of credit scores. In

general, they serve the same purpose, but different brand names in the marketplace.

So, again, just basically saying, do the same thing. You can buy the PLUS Score. You can buy the FICO score. No difference. Let's go on. This one. Use of the plus scores by lenders, which I've talked about as primary characteristic we would submit that people associate with the FICO score, and very specific question that a consumer might ask. Can you tell me which lenders use the PLUS Score? All right.

And you'll have a chance to look at this document when you get back there, but what do they say? Experian has a confidentiality agreement with each of their clients. Experian cannot disclose information about their business clients, including what products they purchase and use from Experian. You know, it goes on. Never. And I asked I think it was Mr. Williams, an Experian witness, why didn't you just come out and give the simple answer, PLUS Score is not used by lenders. Never did that. Okay.

Let's now look at TransUnion. Okay? Let's go to Plaintiffs' Exhibit 649. This is, again, sticking with actual confusion, Plaintiffs' Exhibit 649 is -- you take it, Jeff -- is an internal. Again, we're inside the halls of TransUnion, and let's look at I think it's internal page 4 here.

You look at the summary. Two things are important here. A couple of sentences, the one that says, third line that says there are several places on the TrueCredit web site that there is either incomplete description of the score, credit score being offered or no description at all. Some customers believe that the score they are receiving is the Fair Isaac & Company score.

There may be some testimony in the record. I can't recall it exactly. I'll give Mr. Danaher the benefit of the doubt that they then put a disclaimer saying it's not a FICO score. Try to find that disclaimer when you go back in the evidence. It may be in tiny, tiny print lightly shaded on a web site at the very end somewhere. Perhaps there is a disclaimer there.

If that's the way they tried to fix it, he testified that there is still confusion today, and they have not stopped. They have not done enough to stop the confusion. We've also got TransUnion call logs. You recall we had a huge box of documents. That's Exhibit 667. We had a subset of that. We're just going to show you a few of the items from the TransUnion call log.

Here is one. You know. This is what they wrote inside Experian again. Wants a refund for the score because customer thought it was a FICO. Told him it's a TU and not a FICO and directed him to TUCS to get a FICO. He

demands refund because he says he got misled to get that score. Let's look at another one.

This one says, Customer wants refund for scores. He said that this is not the FICO score and that we lied to him. I told him that the web site says score and FICO score. Call a number. He gives the number. Let's look at another one. Another one.

Refund given. She said that look the score because it was the Empirica one FICO and that it is incorrect. Explained to her the situation. Said there is not any place on the web site that says we offer only the TransRisk. Just customer satisfaction. Refund. One more, and then we will move on.

This one, she wanted to order the FICO. You know, big box of this stuff. They're spread throughout, spread throughout this. So now let's look at the other thing on confusion. So is there confusion? The test is likelihood of confusion. We've shown actual confusion.

Even though there is no requirement to show actual confusion, we've shown it. The other thing you can consider on likelihood of confusion is survey evidence, so let's talk about the survey evidence. Mr. Berger came in here and presented testimony on a survey he had done on the likelihood of confusion, and let's just take a look at the results of that. I think it's slide 9, I think, here.

And here is the key take-away on this. The levels of confusion increased in direct relation to how close the score was to 300 to 850. If you recall back the testimony, he used web site W and Z to mask what the confusion levels were -- mask what the actual sites were, as you can see, site W was the VantageScore site, and I can't remember X and Y.

One was the Experian site, and one was the TransUnion site. I can't remember which one was which. The scores are very close. The point of the matter is that VantageScore is a little farther away from 300 to 850, and TransUnion is exact, and TU is almost exact. As this score got closer to the exact copy, the confusion went up demonstrates that the confusion is not general confusion about credit score. It's specific confusion about ranges.

Now, another thing about Mr. Berger. Mr. Jacoby came in here and criticized Mr. Berger. He did not have a nice thing to say about Mr. Berger at all, and the defendants brought two witnesses into this courtroom, Mr. Jacoby and Mr. Johnson, both of whom are in the survey business. Either one of which, either one of whom could have conducted a likelihood of confusion survey but neither of them did. So step back and ask yourself this question:

Well, likelihood of confusion is a big deal. It's a big deal. They've said, well, why didn't we do a

secondary meaning survey. We've got copying and we've got actual confusion, two important factors. We didn't need a secondary meaning survey. We were the first in the market. We've sold millions of scores.

We've satisfied a whole laundry list of the things the judge was talking about. On consumer confusion, on the likelihood of confusion, we brought in two folks. Could have done that survey. Never did. Why didn't they do it? Well, could it have been for lack of resources? I don't think so. They had the resources to do it if they wanted to.

They didn't do it because they knew that the results of a survey would show that consumers were likely confused about what was going on out there because that's what actually happened. That's what is actually happening today. Even Mr. Danaher testified about that, so that's why they didn't do the survey because it would have yielded the same results that Mr. Berger got.

Let's go to myth number five. Myth number five: The defendants had to copy, they had to copy the 300 to 850 score. Okay? Technically, that's flat wrong, and again, let's go to their documents, Plaintiffs' Exhibit 409. Actually, this is one of our documents. I'm sorry, but it talks about how, let's go to the -- there is a scoring.

This is in FICO scores, and the computer fields

using the FICO scores and the length here is 4. Internal computer systems that take the FICO score are set up to type a four-digit score. I think Mr. Larus elicited some testimony perhaps from Mr. Danaher about five, you have to rely on your own memory, but about five digit possibilities.

So fact of the matter is, doesn't matter. You can use -- you don't have to copy. You don't have to have a three-digit number, and you don't have to copy the FICO score. It has nothing to do with lender adoption issues because what do we know about the infringing scores sold by Experian and TransUnion?

They're not used by lenders. PLUS Score is not sold to lenders, and the TransRisk score in the form it is sold to consumers is not sold to lenders. When they sell their TransRisk score, it's 150 to 950. So there is no reason to copy our score other than they wanted to piggyback off of our name recognition and good will to sell their products.

This whole argument that Mr. Danaher says, well, why would we want to copy somebody. That would be bad for business. You know, people copy stuff all the time because they want to sell the stuff and make money. That's why people copy things. Copying has been proven over the course of history to frequently be very good for business

because you get to piggyback off of somebody else's trademark and their goodwill.

And of course we know the scores don't have to be three-digit numbers. It can be any range. They are merely cosmetic. Again, let's go to Plaintiffs' Exhibit 18. This is another e-mail in which Mr. Burns is involved. The e-mail is to him. He's the CEO of VantageScore, and he's getting some advice from Starkman & Associates, which is a PR firm.

And it says here, Although VantageScore relies on a three-digit number, a third party could easily develop a competing score that returns a two- to four-digit number or any other digit. Hence, do not make it appear that VantageScore is asserting that credit scores need to be three-digit numbers. Yeah. This is behind the walls. This is without lawyer spin. It is behind the walls of what is going on at VantageScore.

Let's take a look at at Plaintiffs' Exhibit 340, internal page 15 of this. Project Trident business plan, this is again where they're figuring out what score range for VantageScore. If you look at market background, the first sentence says, A credit score's range is merely cosmetic.

I went through this with one of the witnesses. You'll have this back there. The scientific background,

you can do anything. It's a probability between zero and one. You can scale it just about any way you would like.

Myth number six. All right. Myth number six: Myth number six is that Fair Isaac should lose because they acquiesced and they waited too long to sue. A couple things to keep in mind here. These folks have been doing business with us for a long time. They have known about our score range.

They have sold scores to lenders with our score range, billions and billions of scores, and they recognize that you can't mimic, that you can't copy. They acknowledge it in the contracts, and we showed you some of those, but here's what is required before they can prove acquiescence, and you will have this.

And the judge is the final say on this, but I believe that she will say something along the lines of, that to prove this they must show that Fair Isaac actively represented that it would not assert a right on the infringement claim, that the delay between the act of representation and the assertion of the right was not excusable and that the delay caused harm to the defendants. I would submit there is no evidence that we actively represented to them that we would not assert a right on the infringement claim.

Myth number seven: If Fair Isaac wins this case,

the world as we know it will come to an end. That's another myth. Lenders are not in this case. Lenders are not confused. Nothing is going to happen to the lender market regardless of the outcome of this case. The world is not going to come to an end.

Now, some of you may be thinking, well, wouldn't it be nice if we could all get along and use the same standard scale? Perhaps. The best scale to use if we wanted to do that would be 0 to 100 because then you would know. It would not be algorithm specific.

You would know where you would be on percentage with the rest of the population. That could be very useful, and of course, the defendants do in fact offer that. TransUnion offers it as a risk percentage on some of their web sites, as does the PLUS Score.

There is, there is a myth here that a score, say, a 720 FICO is the same as a 720 PLUS Score. That's not true because they use different algorithms. Right? So you could have a consumer on an almost identical scale get a PLUS Score of 730 think, well, wow, I'm going to get a great mortgage rate. I'm going to get a low interest rate.

I'm going to my bank. I signed a purchase contract on my house. I go to a bank, and the bank says your FICO score that we're going to base the mortgage on is 680, and your interest rate is a half a point or a point

higher than what you thought you were going to get, and you can't afford the house. That is the real world impact.

That's because they don't use the same underlying algorithm, even if they used the identical score ranges. So the idea that there are to be some standard score ranges, everything is the same no matter what, is another myth. That is another myth. If you really want some standardization, people want to know where they sit in the population, use 0 to 100.

Myth number eight: Fair Isaac committed fraud on the PTO. Mr. Anderson testified, one of the first questions he was asked in cross-examination by Mr. Larus was, do you have an opinion as to whether Fair Isaac committed fraud on the Patent and Trademark Office? And his answer was, no. No. He was not offering that opinion.

He went and offered a lot of opinions, a lot, but he would not offer that opinion, and there is a reason, because Fair Isaac did not in fact commit fraud on the PTO. They are focused on a couple of things. They have focused on Cheri St. John, paragraph 12, where she said that based on her personal knowledge she was not aware of any use of a 300 to 850 range as a unique identifier by anybody else.

First, the statement is absolutely true. Even by the defendants' own admissions, they claim in this courtroom not using their score range as a unique

identifier. They speak out of one side of their mouth for that, and then when they want to find the trademark invalid, they speak out of the other side, but you will also remember Mr. Johnson testifying about what would be relevant and material to the patent office in deciding whether to grant the trademark.

I'm sorry. Mr. Anderson, among the things that Mr. Anderson said was, you don't have to say what infringer is doing out there. All right? Then he was asked this question by Mr. Larus: "Now, I want to go to, I want to go to Ms. St. John's declaration, and you were asked only a couple of questions about this document, but I want to ask some follow-up questions.

"And I believe the only paragraph that you specifically talked about was the paragraph in which Ms. St. John states, To the best of my knowledge, only the FICO score uses the 300 to 850 range as a unique identifier for credit bureau risk scores. Do you see that?

"Answer: Yes.

"Question: Sitting here today, are you aware of any other party that has ever used the 300 to 850 as a unique identifier for credit bureau risk scores?

:Answer: No."

This is after he has been hired and sorted through everything. I don't know where they get the idea

that there was a fraud committed on the patent office, especially intentional fraud, but there is another document we should look at, Exhibit 762. This is an e-mail that supposedly, supposedly gives some knowledge to Fair Isaac about the knock-off score, a score of course Mr. Anderson says is not relevant.

An infringer, somebody else is infringing or copying your score, they're an infringer. You don't have to deal with that. Let's look at in fact what this e-mail said. There was a snippet of this put up I think by Ms. Berens that left some stuff out. I think it's important that we should look at the whole thing. All right?

So it's talking about, this gets interesting when you remember that TU's original customer score had a range of 330 to 830. If memory serves, they didn't copy our publicized FICO score range until later. Then it goes on and says, TU has done a good job of hiding this information. I can't find the score range for its consumer score anywhere on TransUnion.com or TrueCredit.com.

All right? So he doesn't know. He can't find it. All right? He can't find it. No knowledge on that.

Number nine: Last myth, and I will move on to a couple of other things very quickly, is that the myth is that Fair Isaac would have accepted $75,000 from each of

its competitors in exchange for use of its 300 to 850 mark.

First of all, listen very carefully to what the judge tells you about how to calculate the damages in this case if you get to that point, and you will see among the things that she tells you is that you can take factors that you can consider are the same ones that Mr. Meyer considered. Called them the Georgia-Pacific factors, and he had a chart that had a couple of pages of Georgia-Pacific factors, and you will get an instruction on that.

We are not, and I think Mr. Remele said, and I'll give him the benefit of the doubt that he misspoke. We are not seeking lost profits. This is not a case about we have to prove that we lost profits. There are different ways you can measure damages. The way that Mr. Meyer chose was a reasonable royalty.

If the defendants wanted to propose an alternate theory that the measure of damages should be lost profits and that Fair Isaac lost no profits, they could have done so. They did not bring an expert in here to put forth an alternate theory. They brought an expert in here to criticize Mr. Meyer's reasonable royalty theory.

So if they want to make an argument that we have to show we lost some profits, they can't do that because they haven't presented any testimony. Mr. Meyer did not

say I am measuring damages based on the lost profits analysis.

He has said, I'm doing it on a royalty basis, and the way you calculate a royalty is, you look at a base -- remember, he had this -- you look at a revenue base, and you have to remember that every single score that the defendants sold was with a range that we allege is infringing, every one. They haven't used some other range and made some money selling scores with another range.

Every range has been alleged to be infringing, and the context of a reasonable royalty calculation is that, there is this hypothetical negotiation called legal contract that the case law has set. It's two people sitting down at the bargaining table negotiating, saying I want to use 300 to 850, how much will it cost me, and that's the analysis he went through, and it's for every single use of it.

There is no causation factor on that. There is no lost profits. It's I Experian, I TU, want to use that score range in selling my consumer credit score product. How much is it going to cost me, and that's the analysis that Mr. Meyer went through, and it's a fairly straightforward analysis. What's the revenue that would be generated by that times some rate equals the royalty.

What Mr. Meyer did, and you will have, I think,

most of these slides. He provided you with a lot of tools to make a decision on this. He went through and he calculated agreement price, and he went through and calculated actual revenue price, and for Mr. Meyer's hard work in being very up front about what he was doing and being meticulously detailed on how he put together his numbers, he's criticized in somehow being sloppy or speculative, and that's certainly not the case.

And the numbers, the numbers are what the numbers are, right? He came up with and among the things he looked at, one of the things that is driving the price at some level is this bundling aspect, but they bundle their products. They make a lot of money off of their products. They make a lot of money off a site called FreeCreditReport.com.

So the web sites they tell consumers about on television and on web sites is Free Credit Report. You can go there, and you can buy a score with a credit report. They're not out there marketing CreditScore.com. They talk about a free credit report. You can, in fact, get a free credit report at annualcreditreport.com. You have seen that testimony.

Mr. Meyer's slides will be available to you as to how you go about analyzing that, and you know, the numbers, the numbers are what the numbers are for Mr. Meyer. Right?

This is based on agreement prices, this particular chart, and this one is based on actual revenues.

And a 40 percent royalty, that's what TransUnion agreed to in an arm's length transaction. That's where he started. Mr. Meyer didn't pull this number out of the air. It's an actual contract between the parties. So those are the nine factors, ladies and gentlemen. So I've got just two brief things to cover, and then I am done. May I have the Elmo, Jeff? Oh, I can take it up here.

The first is the special verdict form, and you'll have this form, and you are going to decide who prevails in this case and who loses, and if you decide that Fair Isaac prevails in this case, this form has to be filled out in a very specific manner.

All right? So if you come to the conclusion that we have proven our case and we win, you have to fill the form out. You have to fill question one out by saying yes, we have shown secondary meaning, and then you have to fill out number two that we have shown it before the following defendants alleged infringing use.

Now just one comment on TU. There is zero evidence of a web site that TU has put in in this case showing their use of their knock-off score range before mid 2004. Mr. Danaher has testified about it. It's their case, their company, not a single web site. You can search

high and low, and you won't find it. There have been tons of web sites produced in this case.

The next page has questions on, you know, do they have a similar score range without our consent in a manner likely to cause confusion about source, sponsorship or affiliation. That's the test, in a manner likely to cause confusion about source, sponsorship or affiliation of their products or services.

Then you get into what has been referred to as the defenses, and you've got, is it functional. If you want us to prevail, you check that no. If you want them to win, you check it yes. Same thing on the fair use. You need to check that no. Then here, acquiescence, again, no. Then on this box on willful infringement, if you find that what they have done is willful, then you check those boxes yes.

Then question 8 which carries -- your form might be slightly different. The questions are the same. Some of the other information may change when you get the very final version. This one is on money damages. It's got a question here, and of course there is only Experian and TransUnion because the VantageScore is sold through those sites, and it is taken into account in Mr. Meyer's numbers. I have left that blank.

Okay. I have checked the other ones because

those must be checked the way I said if we're going to prevail. You have all the tools you need to make a decision on what the right number is to put in there if you find that we should win, and then there are three questions on the fraud on the patent office, and we would submit that each one of those needs to be checked no. All right?

So final point: Let's just -- what you do matters. You are part of a tradition that goes back almost 800 years. Back in the year 1215, the barons of England confronted King John and demanded certain rights, and one of the rights they demanded, and it was written in a document called the Magna Carta, was the right to a jury trial.

That right carried through the English common law and was taken over here by the founders of this country and has been incorporated into this system, and so what you do matters. You are the voice of the community, and your decision in this case will say certain conduct is okay or certain conduct is not okay.

And I have been doing jury trials for a long time, and I think it's important to understand what it means when you reach your verdict, and if you decide that the defendants get off the hook here, ladies and gentlemen, and if they walk out of this courtroom, and you find that their behavior has not caused confusion to consumers, and

you find that Fair Isaac should take nothing for that, then you will, what you will have in effect done is taken Exhibit 326, which is the Experian copying exhibit, and you will give it a seal of approval.

Actually, it's the TransUnion copied document. You have given that seal of approval. You will have given the copying done by Experian a seal of approval. You will have given the call scripts a seal of approval. You will have given the confusion evidence a seal of approval. You will have given the web sites a seal of approval.

I have a lot of stickers, and I have a lot of documents, but I hope that I have made the point that what you do is incredibly important. You have not sat here for three weeks at some academic mock exercise. Your decision has an impact on what happens in the consumer marketplace.

With that, ladies and gentlemen, I thank you very much for your time.

THE COURT: All right. Members of the Jury, I'm going to send you to lunch now. I'm going to send you to lunch in the custody of the court security officers, mainly because I want to you get your lunch paid for at the cafeteria downstairs, but also to make sure that nobody runs away on me before I give you the instructions.

So we're going to send you to lunch now. We're going to have you come back. We're going to have a little

shorter lunch hour, 45 minutes. We're going to begin at quarter to two, at quarter to two. 1:45 we will begin, and I will give you the instructions of law at that time.

The Court will be in recess until 1:45.

(Lunch recess taken.)

(1:42 p.m.)

IN OPEN COURT

(Without the jury)

THE COURT: Good afternoon. Please be seated.

It's my understanding that someone had an issue prior to the arrival of the jury.

Mr. Glancy, you appear to be the person.

MR. GLANCY: Your Honor, if I may.

There was a serious misrepresentation made in Mr. Schutz's closing that we believe needs to be addressed with the jury; otherwise, we have no remedy.

You may recall that Mr. Schutz represented that Mr. Anderson testified in response to a question from Mr. Larus that he had no opinion as to whether or not there was fraud on the Trademark Office. He was never asked that question by Mr. Larus. There is no --

THE COURT: This is the question about deception, as I recall.

MR. GLANCY: Right. And then Mr. Schutz went so far as to infer from that or ask the jury to infer that Mr. Anderson had concluded that there was no fraud on the Trademark Office.

Now, the only reason he was not testifying about that was because your Honor restricted his testimony, so I think it's fundamentally unfair for them to take -- to

leverage that restriction and suggest to the jury that Mr. Anderson has no opinion when he clearly does. He's just not able to testify to it. And the impression left by Mr. Schutz is that Mr. Anderson had concluded for himself that there is no fraud on the Trademark Office.

THE COURT: I don't think it -- I'm going to give them the standard cautionary instruction about reliance on what the Court says of the law and the facts. I do think that there was no testimony with regard to Anderson and a conclusion with regard to fraud, but he did clearly say that he found -- that he didn't make an opinion with regard to deception. The jury listened carefully to the testimony. I don't think they'll rely on Mr. Schutz's version for that. I think they've got their -- they've got their notes.

MR. GLANCY: I understand the point, your Honor. It's just that, you know, there's been a week and a half of testimony and I don't understand -- I don't see how a reasonable juror could have in his or her notes what Mr. Anderson did not testify about to check against Mr. Schutz's representation.

THE COURT: Well, they could check to see if he said anything about fraud.

MR. GLANCY: Right. Well, some people -- well, here's the insidious part. I asked him up front whether or not he was here to offer an opinion about intent and he said

no, which was true, because we wanted to make it clear to the jury this is the box he's in. So that was the only question about intent or fraud on that. And so they've taken my question and insinuated that he affirmatively represented he has no opinion, so they may actually recall there was a question about intent asked of Mr. Anderson and he did say he didn't have an opinion on that. This is the insidious game being played here in the closing.

THE COURT: I understand and I understand where you're coming from. I think any cure I attempt is going to be worse than the harm. I think it may highlight that area of the testimony unnecessarily. So we'll proceed to summon the jury and get on with the instructions.

(Jury enters)

THE COURT: Good afternoon again. Please be seated.

We are in the bottom of the ninth inning. What remains is my instructions of law to you and I will do the best I can to get through these instructions. Some of you may have noticed I have something that my doctor calls an irritated airway, and so if I can't make it, we may have to take a break or worse case scenario, my law clerk may have to read and I'll just move my lips and do it that way.

(Laughter)

COURT'S INSTRUCTIONS TO THE JURY

THE COURT: Members of the Jury:

The instructions that I gave you at the beginning of this trial and those that I gave you during the course of the trial remain in effect, and I'm now going to give you an additional set of instructions.

But you must, of course, continue to follow the instructions I gave you earlier as well as those I'm giving you in this set of instructions. This is true even though some of the instructions that I gave you at the beginning of the trial might not be repeated again now.

The instructions that I am about to give you, as I mentioned this morning, are in writing and we're going to provide several copies of those for your use in the jury room. But I want to emphasize that just because these instructions are in writing doesn't mean that they're any more important than my earlier instructions. All instructions, whether or not given to you in writing, must be followed by the jury.

Now that you have heard the evidence and the arguments of counsel, it does become my duty to give you the instructions of the Court as to the law which is applicable to this case.

And it is your duty as jurors to follow the law as I shall state it to you and apply that law to the facts as

you find them to be from the evidence in this case. You are not to single out any one instruction alone as stating the law, but you should consider these instructions as a whole. You're also not be concerned with the wisdom of any rule of law as stated by me.

Now, the lawyers in their arguments have quite properly referred to some of the governing rules of law, but if there's any difference that appears to you between the law as it's told to you by the lawyers in the case and that that I'm giving you now in these instructions, you are of course to be governed by the Court's instructions.

Now, nothing I have said in these instructions is intended in any way to indicate to you that I have an opinion about the facts of this case or what that opinion might be, because it's not my function to determine the facts, but rather that's your function. Also, during the course of the trial, I've occasionally asked questions of a witness or made various comments from time to time, but you should not assume that because I asked any questions or said anything to the witnesses, that I hold any opinion with regard to the matters on which my questions were asked. Most of the time I think they were to hurry up and get the witness to a point to be efficient in our use of time and from time to time I tend to add a little levity to the proceedings when the lifting gets a little heavy around here.

You may perform your duties as jurors and you must perform your duties without bias or prejudice to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion. All of these parties have a right to expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

As you know, all of the parties in this case are corporations, and a corporation is entitled to the same fair trial at your hands as an individual. All parties, including corporations, partnerships, unincorporated associations, and all other types of organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

A corporation, of course, can only act through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of those individuals' authority.

Now, I have allowed you during the course of the trial to take notes and I know many of you have, and you may use your notes with you in the jury room. But I want to caution you that you should not consider your notes as binding or conclusive, and that's true whether they're your notes or those of one of your fellow jurors. Another way of

saying this is your notes should be used as an aid for your memory, not a substitute for your memory. You should not give greater weight to a particular bit of evidence solely because someone chose to reduce it to writing. I want to make clear to you that it's your recollection of the evidence which should control, and you should disregard anything contrary to your own recollection which might appear in your notes or those of another juror.

Now, the statements and the arguments, all of the things the lawyers say, are not evidence in the case, but from time to time when the lawyers on both sides stipulate -- which is just really a lawyerly way of saying agree -- as to the existence of a fact, the jury may, unless otherwise instructed, accept that stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in this case always consists of the sworn testimony of the witnesses, regardless of who may have called the witness; all of the exhibits which were received in evidence, regardless of who may have produced the evidence and the exhibits; and all of the facts which have been admitted to or stipulated to.

Now, the attorneys have at times objected to evidence that they believed was not properly offered under the rules of evidence. Any evidence to which an objection

was sustained by the Court, and any evidence I ordered stricken during the course of the trial, must be entirely disregarded by the jury.

If a lawyer asks a witness a question which contains an assertion of fact, you may not consider the assertion as evidence of the fact, because again, the lawyers' statements are not evidence.

Now, the burden is on the plaintiff, in this case Fair Isaac, to prove every essential element of their claims by the greater weight of the evidence. If the proof shall fail to establish any essential element of Fair Isaac's claims by the greater weight of the evidence in the case, the jury should find for the defendants as to those claims. In addition, the defendants here have raised what are known as affirmative defenses to Fair Isaac's claims. Defendants have the burden of proving these affirmative defenses which I'll be explaining to you in a few minutes.

To prove something by the greater weight of the evidence means to prove that something is more likely so than not so. In other words, the greater weight of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. The rule does not, of course, require proof to an absolute certainty, since

proof to an absolute certainty would seldom be possible in any case. You may have heard the term from time to time "proof beyond a reasonable doubt." That is a stricter standard, a higher standard of proof, which applies only in criminal cases. It does not apply in civil cases such as this and therefore you should put the notion of proof beyond a reasonable doubt out of your minds for purposes of this case.

In determining whether any fact in issue has been proved by the greater weight of the evidence in the case, you may, unless otherwise instructed, consider all of the testimony of the witnesses, again, regardless of who may have called them, and all of the exhibits which were received in evidence, again, regardless of who may have produced them.

When I say in these instructions that a party has the burden of proof on any particular proposition or claim, or I use an expression such as "if you find" or "if you decide," I mean that you must be persuaded, considering all of the evidence in the case, that a proposition is more probably true than not true.

As you know, there are three defendants in this case: Experian, TransUnion, and VantageScore, LLC. However, you should decide this case as to each defendant separately. If you should find that one of the defendants is liable to Fair Isaac, it does not necessarily follow that all

defendants are liable. Unless otherwise instructed, though, my instructions are going to apply to all of the defendants. And then you'll see as you get to the special verdict form how it breaks out the different defendants as you proceed through the questions.

Now, there are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of the case. One of those we call direct evidence and the other is circumstantial evidence. Direct evidence is such things as the testimony of an eyewitness. The other kind of evidence, circumstantial evidence, is also known as indirect evidence and it is the proof of a chain of circumstances pointing to the existence or the nonexistence of certain facts.

As a general rule, the law makes absolutely no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the greater weight of all of the evidence in the case, whether it's direct evidence or circumstantial evidence.

Now, you should consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited to what strictly what you see and hear as the witnesses testify. You are permitted to draw, from the facts which you find have been proved, such

reasonable inferences as seem justified in light of your own experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from the facts that have been established by the evidence in the case.

You will make your decision based upon what you recall of the evidence. You will not have a typewritten transcript of the case to consult. So it's your memories and your notes that should guide in your deliberations.

Now, ordinarily the rules of evidence do not permit witnesses to come into court and to express opinions or conclusions, but there is an exception to that opinion rule as to witnesses who we call expert witnesses. Witnesses who, by virtue of their education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for their opinions.

You should consider each expert opinion received in this case and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should decide that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you have the right to disregard the

opinion entirely.

During the course of the trial, I have allowed certain charts and summaries to be shown to you in order to help explain the facts which are disclosed by the books, records, and other documents which are in evidence in the case. However, any charts or summaries are not in and of themselves proof or evidence of any facts. If such charts or summaries do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard them.

In other words, charts and summaries are used only as a matter of convenience, so if and to the extent that you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

Now, you are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses that does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence which does produce such belief in your minds.

In other words, the test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, but which witness, and which evidence, appeals to your minds as being most accurate or otherwise trustworthy.

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary, if, after consideration of all of the evidence in the case, you hold greater belief in the accuracy or the reliability of the one witness.

Now, one of your principal jobs as jurors will be to determine the credibility -- that's another word for believability -- of each of the witnesses and the weight that their deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of testimony given.

You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive, and state of mind, and the witness's demeanor or manner while on the witness stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to

either side in the case, the manner in which each witness might be affected by your verdict, and the extent to which, if at all, each witness is either supported by or contradicted by other evidence in the case.

Now, inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you as the jury to discredit such testimony. As I think we all know, two or more persons witnessing an incident or a transaction may simply see and hear it differently, and innocent misrecollection, just like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether that discrepancy results from an innocent error or an intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, that you think it deserves. Again, you should rely upon your own experience, good judgment, and common sense.

You may, in short, accept or reject the testimony of any witness either in whole or in part.

A witness may be discredited or -- another lawyerly word -- impeached by contradictory evidence, or by evidence that at some other time the witness has said or done something or has failed to say or do something which is

inconsistent with the witness's present testimony.

If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, that you may think it deserves.

If a witness is shown to knowingly have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars, and you may reject all of the testimony of that witness or you may give it such credibility as you think it deserves.

An act or omission is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

I'm sure you will recall that during the course of this trial certain testimony was presented to you by way of videotape deposition and maybe regular depositions. I can't remember. There may have been some. I can't remember if there were any just read to you. I think they were all videotape. But these depositions consist of the sworn

recorded answers to questions which were asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath or on a video recording played on a monitor like we did in this case. Such testimony by videotape is entitled to the same consideration and is to be judged as to its credibility, and weighed, and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present and had testified from here on the witness stand.

You might recall that at the beginning of this trial I previewed some of the legal concepts which you heard during the course of the trial, and I'm now going to explain some of those concepts again, as well as the other legal concepts that you will need to understand to decide this case.

A trademark is also referred to in short as a mark, and it is a word, name, symbol, or device, or a combination of those things, that indicates the source of products or services. The owner of a valid trademark has the right to exclude others from using the mark or a similar mark in a manner that would be likely to cause confusion as to the source, sponsorship, or affiliation of the products or services at issue and may enforce this right in an action for

trademark infringement.

Rights in a trademark are obtained only through commercial use of the mark. It is not necessary for the owner of the trademark to obtain a registration of its mark from the United States Patent and Trademark Office, but registration provides certain additional rights and benefits to the owner.

You have heard during this trial that Fair Isaac obtained registrations from the United States Patent and Trademark Office of its trademarks relating to the 300 -- and I don't know for sure what you call the little thing, the little bar in the middle, whether it's a hyphen or a dash, but I think you know what I'm talking about -- 300 -- and I'm going to say dash -- 850 scoring range. Once the owner of a trademark has obtained the right to exclude others from using the trademark, the owner may also obtain a certificate of registration issued by the Patent and Trademark Office. When the owner of a registered trademark brings an action for infringement of a trademark, a certificate of registration is evidence of the validity of the mark and the registration, the owner's ownership of the trademark, and the owner's right to exclude others from using the trademark. However, registration of the "300-850" trademark is not conclusive as to the validity of the trademark, and you may also consider evidence offered by the defendants that the "300-850"

trademarks are invalid.

Fair Isaac's trademark registrations and the registration certificates were admitted to show issuance of the mark. The registrations and certificates should not be considered as evidence of secondary meaning in the term "300-850."

Now, it is important for you to understand that throughout these instructions from now on, I'm going to "300-850" as a trademark or mark, and whether it's a valid trademark will be for you to determine in accordance with these instructions. But for convenience and ease of reference so that I don't have to keep saying "alleged trademark" or "alleged mark," I'm going to refer to "300-850" as a trademark.

Fair Isaac alleges that the defendants are infringing its trademarks in the term "300-850." To prevail on this infringement claim, Fair Isaac has the burden of proving two elements by the greater weight of the evidence, and here are the two elements:

1. That the term "300-850" is a valid, protectable mark; and

2. That the defendants made use of a same or similar term without the consent of Fair Isaac in a manner that is likely to cause confusion among ordinary customers as to the source, sponsorship, or affiliation of the credit

scoring products or services.

As I mentioned earlier, you should decide this case as to each defendant separately. Accordingly, you shall evaluate each of the elements just mentioned as to each defendant separately. In other words, your determination of these elements to a particular defendant need not necessarily be the same as your determination to the other defendants.

All right. Now, John is going to display on the monitor so that you can follow along with me the questions as I'm going to walk you through the special verdict form.

There you will see the official case caption of the case, Fair Isaac Corporation versus Experian Information Solutions, TransUnion LLC, VantageScore, LLC, and some other material there, and it lists Special Verdict Form and the civil case number, all of which are important to the court system but you shouldn't worry about.

"We, the jury in the above-titled matter, find the following answers to the following questions submitted to us by the Court."

And Question Number 1 asks you, as you see there: "Has '300-850' acquired secondary meaning?"

Again, the first element of Fair Isaac's claim that the defendants are infringing the alleged "300-850" mark is that the mark is valid. This descriptive mark is valid and, thus, protectable, only if you find that the term "300-850"

has acquired what is known as secondary meaning.

A term acquires secondary meaning when it has been used in such a way that its primary significance in the minds of the prospective consumers is not the product itself, but the identification of the product with a single source, regardless of whether consumers know who or what that source is. The evidence must show that a significant number of the consuming public associate the term "300-850" with a single source in order to find that it has acquired secondary meaning. It is for you to decide how many constitute a significant number.

You may consider the following factors in determining whether the term "300-850" has acquired secondary meaning. Here's a list now I'm going to give you of nine different factors to consider in determining secondary meaning.

1. Whether the consumers who purchase the products or services that bear a"300-850" trademark associate the trademark with a single, anonymous source;

2. To what degree and in what manner Fair Isaac may have advertised under the "300-850" trademark;

3. Whether Fair Isaac successfully used the "300-850" trademark to increase the sales of its products or services;

4. The length of time and manner in which Fair

Isaac used the "300-850" trademark;

5. Whether Fair Isaac's use of the "300-850" trademark was exclusive;

6. Whether the defendants intentionally copied Fair Isaac "300-850" trademark;

7. Whether the defendants' uses of scoring ranges claimed to be similar to the "300-850" mark has led to actual confusion regarding source;

8. The results of consumer surveys; and

9. The extent to which Fair Isaac holds an established place in the market.

Just because Fair Isaac is using the term "300-850" or began using the term before the defendants used their scoring ranges does not, by itself, mean that Fair Isaac is using the term as a trademark or that the term has acquired secondary meaning. However, there is no particular length of time that a trademark must be used before it obtains secondary meaning.

If you find that the term "300-850" has not acquired secondary meaning, then Fair Isaac's "300-850" mark is not valid and protectable. If you find that the term has acquired secondary meaning, you must then determine whether Fair Isaac so used the term as to develop a secondary meaning before the defendants began their allegedly infringing conduct. If you find that Fair Isaac has not established

that Fair Isaac so used the term to develop a secondary meaning before a particular defendant began its allegedly infringing conduct, there has been no infringement of the "300-850" trademark as to that defendant.

And that issue about the timing is addressed in Question Number 2 which will pose the following question to you for an answer: "Did '300-850' acquire secondary meaning before the following Defendants' allegedly infringing uses," and you'll see a subquestion there as to each defendant, Experian, TransUnion, and VantageScore, and a yes or a no.

Now, you'll see following each question, like after Question 1, we've given you some signaling language which tells you where to go, because there's some questions you may not need to answer depending upon your answer to various questions. And hopefully we've gotten our signals right. We've all tried to proofread this a number of times to make sure we've got it down.

But if your answer to Question Number 1 is yes, you would then continue to Question Number 2, logically. If you answer Question Number 1 no, you will be skipping over Questions 2 through 8 and proceeding to Question Number 9.

Now, I'm going to assume that you've gotten to Question Number 2 because I've just read that to you, and again, with regard to your second answer as it relates to the subparts as well, if your answer is yes as to a defendant,

you then continue on to Question Number 3 as to that defendant. If your answer is no, again, you would then skip ahead to Questions 3 through 8 as to that defendant.

All right. Now I think we are ready to move on to Question Number 3, which asks you: "Did the following Defendants use a mark the same as or similar to Fair Isaac's "300-850" mark without Fair Isaac's consent in a manner that is likely to cause confusion about the source, sponsorship, or affiliation of their products or services?" And then you will answer the question as to each defendant, Experian, TransUnion, and VantageScore. If your answer is yes as to a defendant, you would continue to Question Number 4 with respect to that particular defendant. If you answer Question Number 3 no as to a defendant, you do not answer Questions 4 through 8 as to that defendant.

Any further reference I make to the term "300-850" being a mark or trademark assumes again that you have found the term to be a valid trademark. Again, I'm doing this simply for ease of reference and does not suggest that I have a view one way or another on the issue of secondary meaning.

The second element of Fair Isaac's infringement claims requires you to consider whether the defendants used Fair Isaac's "300-850" trademark in a manner that is likely to cause confusion about the source, sponsorship, or affiliation of their products or services. General confusion

about credit scoring or reporting is not sufficient. Like your evaluation of the first element, your evaluation of this element is required as to each defendant. You may draw upon your common experience as citizens of the community in deciding this question. In addition to the general knowledge you have acquired throughout your lifetimes, you may also consider the following list of factors:

1. The strength or weakness of Fair Isaac's mark. The more the consuming public recognizes Fair Isaac's trademark as an indication of origin of Fair Isaac's products or services, the more likely it is that consumers would be confused about the source, sponsorship, or affiliation of the defendants' products or services if the defendants use a similar mark.

Another factor you consider is the defendants' use of the mark. If the defendants and Fair Isaac use their trademarks on the same, related or complementary kinds of products or services, there may be a greater likelihood of confusion about the source of the products or services than otherwise.

Third factor: Similarity of Fair Isaac's and the defendants' marks. If the overall impression created by Fair Isaac's trademark in the marketplace is similar to that created by the defendants' trademark in appearance, there is a greater chance of likelihood of confusion.

Another factor is actual confusion. Actual confusion as to the source, sponsorship, or affiliation is not required for a finding of likelihood of confusion. Even if actual confusion did not occur, the defendants' uses of the trademark may still be likely to cause confusion. If uses by the defendants of Fair Isaac's trademark have led to instances of actual confusion, this strongly suggests a likelihood of confusion. As you consider whether the trademark used by the defendants creates for consumers a likelihood of confusion with Fair Isaac's trademark, you should weigh any instance of actual confusion against the opportunities for such confusion. If the instances of actual confusion have been relatively frequent, you may find that there has been a substantial actual confusion. If, by contrast, there is a very large volume of sales, but only a few isolated instances of actual confusion, you may find that there has not been substantial actual confusion. I will caution you, however, that you should consider only those instances of actual confusion that you find were caused by the defendants' uses of Fair Isaac's trademark, as opposed to instances of actual confusion that were caused by other factors.

Next factor to consider: Defendants' intent. Knowing use by a defendant of Fair Isaac's mark to identify similar products or services may strongly show an intent to

derive benefit from the reputation of Fair Isaac's mark, suggesting an intent to cause a likelihood of confusion. On the other hand, even in the absence of proof that a defendant acted knowingly, the use of Fair Isaac's trademark to identify similar products or services may indicate a likelihood of confusion.

Another factor to think about is marketing and advertising channels. If Fair Isaac's and the defendants' products or services are likely to be sold through the same or similar channels, or advertised in similar media, this may increase the likelihood of confusion.

Consider also the consumer's degree of care. The more sophisticated the potential buyers of the products or services or the more costly the products or services, the more careful and discriminating the reasonably prudent consumer exercising caution may be. They may be less likely to be confused by similarities in Fair Isaac's and the defendants' trademarks.

Another factor to consider is the results of consumer surveys.

You're also allowed to consider other any other factors about Fair Isaac's and the defendants' products or services that would tend to reduce or increase the likelihood of confusing the consumer as to the source, sponsorship, or affiliation of the products or services.

In light of these considerations and your own common experience, you must determine if ordinary consumers, neither overly careful ones nor overly careless ones, would be confused as to the origin of the product or service, upon encountering the marks as the respective parties may have used them in connection with their products and services. No one factor or consideration is conclusive, but each aspect should be weighed in light of the total evidence presented during the trial.

Question Number 4. As you can see on the screen there, Question Number 4 is going to ask you: "Is the term '300-850' a feature of Fair Isaac's products or services that is 'functional'?"

As I mentioned earlier, the defendants have raised certain affirmative defenses to Fair Isaac's claims. The defendants have the burden of proving these defenses by the greater weight of the evidence. The first such defense is that the term "300-850" is a feature of Fair Isaac's products or services that is "functional." Features that are functional are not entitled to trademark protection. A feature is functional if it is essential to the use or purpose of the product or service or if it affects the cost or quality of the product or service. If restricting the ability to use that feature to one provider of the products or services, to the exclusion of competitors, would

significantly hinder the competitors' ability to compete effectively, the feature is functional. But if a competitor can effectively compete without copying the particular feature, then the feature is not functional. If you find that the defendants have proved this defense by the greater weight of the evidence, there has been no infringement of Fair Isaac's "300-850" mark.

If you answer Question 4 no -- that's the one about functional -- you would continue to Question 5. If you answer yes, you would be skipping ahead as to that defendant who you are tracking as you go through the special verdict form. And you would get to Question Number 5, which poses the following question to you: "Did the following Defendants prove their 'fair use' defense to the claim of infringement of the "300-850" mark?" And again, you will be asked questions to separate out each of the three defendants, Experian, TransUnion, and VantageScore.

The defendants assert the affirmative defense of 'fair use' to the claims regarding the "300-850" mark. Under the law, the owner of a trademark cannot exclude others from making fair use of that mark. A defendant makes fair use of a mark when the defendant uses it other than as a trademark to accurately describe the defendant's own products or services.

To prevail on this defense, a defendant must prove

the following elements by the greater weight of the evidence, and this time we have a set of three elements.

1. The Defendant used "300-850" otherwise than as a trademark;

2. The Defendant used "300-850" fairly and in good faith; and

3. The Defendant used "300-850" only to describe its products or services.

Again, remember that you are to decide this case as to each defendant separately. Therefore, you should evaluate each of the elements just mentioned as to each defendant separately. Your determination again of whether a particular defendant has established these elements need not necessarily be the same as your determination regarding the other defendants.

If you find that a defendant has proved this defense by the greater weight of the evidence, there has been no infringement of Fair Isaac's "300-850" mark as to that defendant.

I think we'll take what probably is going to be our last standing stretch break together. Two outs in the ninth. Just one to go.

(Laughter)

(Pause)

THE COURT: Okay? Everybody ready?

I believe we are to Question Number 6. Question Number 6 poses the following interrogatory to you. It says: "Did Fair Isaac 'acquiesce' to the infringement of the "300-850" mark by the following Defendants," and I'm guessing you know the three defendants by now: Experian, TransUnion, and VantageScore.

Defendants assert the affirmative defense of acquiescence regarding the "300-850" mark. Acquiescence means the active consent through words or actions by the owner of a mark to another's use of the mark. To establish this defense, defendants must prove by the greater weight of the evidence that -- three factors:

1. Fair Isaac actively represented that it would not assert a right on the infringement claim;

2. The delay between the active representation and the assertion of the right or claim was not excusable; and

3. The delay caused undue prejudice to the defendants.

In evaluating whether any delay was not excusable, the time of the alleged delay is measured not from when Fair Isaac first learned of the potentially infringing use, but instead from when such infringement became actionable and provable. In this regard, you may also take into account the extent to which Experian and TransUnion altered or expanded their marketing efforts or changed the nature of their uses

over time in such a manner that their uses became more similar to Fair Isaac's "300-850" mark or more directly competitive with Fair Isaac.

Again, you should evaluate this defense as to each defendant separately. If you find that a defendant has proved the elements of this defense by a greater weight of the evidence, there has been no infringement of Fair Isaac "300-850" mark as to that defendant.

Question Number 7 reads as follows: "Was any infringement of the '300-850' mark by the following Defendants willful?" Again, you will be required to answer that question as to Experian, TransUnion, and VantageScore.

If you find that a defendant infringed Fair Isaac's "300-850" trademark, you must also determine whether that defendant's infringement was willful. A defendant's infringement was willful if you find that the defendant intentionally set out to deceive or confuse consumers as to the source, sponsorship, or affiliation of its products or services.

The next three instructions all relate to Question Number 8 which I'll refer to as the damages question. Question Number 8 as you'll see it on the verdict form will ask you: "What amount of money in the form of a 'reasonable royalty' will fairly and adequately compensate Fair Isaac for any damage caused by Experian's and TransUnion's infringement

of the '300-850' mark," and you'll have to answer that breaking out the damages as to Experian and TransUnion.

If you find that Fair Isaac has proved an infringement claim against a defendant, you must then determine the amount of money that will reasonably and fairly compensate Fair Isaac for any injury you find was caused by that defendant's infringement of Fair Isaac's trademark. For an injury to be "caused" by a defendant's infringement means that the infringement played a substantial part in bringing about the injury. Fair Isaac has the burden of proving its actual damages by the greater weight of the evidence. Determination of damages must not be based upon speculation or guess.

Fair Isaac seeks damages on its claims against Experian and TransUnion for what is known as a "reasonable royalty." A reasonable royalty is an amount of money that a trademark owner and a defendant would have agreed upon or agreed to in a hypothetical arm's-length negotiation taking place at the time when that defendant's alleged infringement first began. You may award a reasonable royalty as damages only for past infringement you may find. You should not consider any future infringement.

You may consider the following long list of factors in determining a royalty, and I think there are 14 of those and I'll read those to you now. These are the factors that

apply in consideration of a reasonable royalty:

1. Royalty rates received by prior licenses by Fair Isaac;

2. Prior rates paid by Experian and TransUnion;

3. The nature and scope of the license, such as exclusive or nonexclusive;

4. Fair Isaac's licensing policies;

5. The commercial relationship between Fair Isaac and Experian and TransUnion;

6. The special value of the mark to Experian and TransUnion;

7. The duration of the trademark and the term of license;

8. The profitability of the trademark;

9. The utility and advantages of the trademark over prior marks;

10. Benefits to those who have used the trademark;

11. The extent to which Experian and TransUnion have used the mark;

12. Reasonable royalties within the industry;

13. Opinion testimony by experts; and finally

14. The amount that the parties would have agreed upon in voluntary negotiations.

Now, the fact that I have instructed you as to the proper measure of damages should not be considered by you as

intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given to you for your guidance in the event you should find in favor of a party from the greater weight of the evidence in accordance with the other instructions.

Let me now read to you Questions 9, 10 and 11 of the special verdict form.

Question 9 will ask you to answer this question: "Did Fair Isaac make a false representation of fact during the application process to the United States Patent and Trademark Office for registrations of the '300-850' trademark?"

If your answer to Question 9 is yes, you would continue to Question 10. If your answer to Question 9 is no, you would have completed the special verdict form and you would not answer Questions 10 nor 11.

Question 10 asks you to determine: "Did Fair Isaac know the representation to be false when it was made and intend to deceive the United States Patent and Trademark Office?"

Again, if your answer is yes, you would continue on to Question 11. However, if your answer is no, you would not answer Question 11.

And finally, Question 11 asks you to determine: "Did the United States Patent and Trademark Office rely on

the false representation in deciding to issue the registrations?"

Again, that would be responded to with a yes or no answer.

As I told you at the beginning of the case, the defendants have asserted what's called a counterclaim, alleging that Fair Isaac committed fraud on the United States Patent and Trademark Office during the application process for registration of its "300-850" trademark. To prevail on this counterclaim, the defendants have the burden of proving the following elements by clear and convincing evidence. This is different than greater weight of the evidence. It's a higher standard, clear and convincing, and it requires that you find three elements:

1. Fair Isaac made a false representation of fact during the application process;

2. Fair Isaac knew that representation to be false when it was made and intended to deceive the United States Patent and Trademark Office; and

3. The false representation was material in the sense that the Patent and Trademark Office relied upon it in deciding to issue the registration.

To prove something "by clear and convincing evidence" means you must be persuaded by the evidence that it is highly probable. This again is a higher standard than

"greater weight of the evidence." Nevertheless, this standard, just like greater weight of the evidence that I spoke to you about earlier, does not require proof to an absolute certainty, again, since proof to an absolute certainty is seldom possible in case. Again, I will remind you to put out of your minds any thought about the burden of proof beyond a reasonable doubt, which is simply inapplicable to this case.

Now, there are some matters that you may have heard mentioned during opening statements or about which there was testimony, and one of these would be the use of keywords as Internet search terms, which are no longer in the case for your consideration. These are matters that the Court will decide rather than the jury.

Members of the jury, it is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your own individual judgment. Each of you must decide this case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and to change your opinion, if you become convinced that it is erroneous. On the other hand, do not surrender your honest conviction as to the weight or the effect of the evidence solely because of the opinion of your fellow jurors,

or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- judges of the facts, and your sole interest should be to seek the truth from the evidence in this case.

Upon next retiring to the jury room, you should select one of your members to act as your presiding juror. That presiding juror will preside over your deliberations and will become your spokesperson here in court. The form of verdict has been prepared for your convenience and you will be taking it with you to the jury room.

Again, you will note that some of the questions call for a yes or no answer and the answer to each question must be the unanimous answer of the jury. Your presiding juror will write the unanimous answer of the jury in the space provided opposite each question. And again, you will note that there are some questions that do not require a yes or no answer. As with all other questions, your answer to these questions must be the unanimous answer of the jury.

Again, your verdict must be based solely on the evidence and on the law which I have now given you in these instructions. Again, nothing that I have said or done during the case is intended to suggest to you what verdict I think you should reach because that's entirely for you to decide. You must not permit prejudice, sympathy, or emotion to influence your verdict.

After the jury has answered each of the questions asked, the presiding juror will date and sign that verdict and it will be complete and you will then be returning with it to the courtroom.

If it does become necessary during the course of your deliberations to communicate with the Court, you may do so by sending a note through the court security officer signed by your presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any matter which touches the merits of this case other than in writing or orally here in open court.

You will note from the oath about to be taken by the court security officers that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of this case.

Bear in mind that you are not to reveal to any person -- not even to the Court -- how the jury stands, numerically or otherwise, on the questions before you until after you have reached a unanimous verdict.

Members of the jury, your duty is to both the plaintiffs and the defendants. They each have a right and an expectation that you will see that justice is done. This

responsibility must be borne courageously and without fear or favor. It is not an arbitrary power, but one that must be exercised with fairness, sincere judgment and sound discretion.

The final test of the quality of your service will lie in the verdict which you return to this Court and not in the opinions any one of you may hold as you retire from the case. Remember again at all times you are not partisans nor advocates, but triers of the fact.

Counsel, does anyone wish to call my attention to any errors, omissions or corrections in the charge read to the jury?

On behalf of the plaintiff, Mr. Schutz?

MR. SCHUTZ: None, your Honor.

THE COURT: Mr. Milne?

MR. MILNE: None, your Honor.

THE COURT: Mr. Remele?

MR. REMELE: None, your Honor.

THE COURT: Ms. Berens?

MS. BERENS: None, your Honor.

THE COURT: All right. The court deputy will come forward to be sworn.

(Court security officer sworn by the calendar clerk)

THE COURT: All right. Members of the jury, we are going to send in with you one copy of the special verdict

form. I'm not silly enough to send multiple copies in and get multiple answers back, just one. You will get multiple copies of the instructions so that you can look at those and go through them, and then in just a few minute all of the exhibits will be arriving and you'll have those to examine as well.

All right. At this time we will stand for the jury and the jury may proceed to commence their deliberations.

(Jury excused to deliberate at 2:43 p.m.)

THE COURT: Please be seated. The record should reflect that we are outside the presence of the jury.

Anything that needs to be brought to the Court's attention outside the presence of the jury on behalf of the plaintiff?

MR. SCHUTZ: None, your Honor.

THE COURT: Anything on behalf of any defendant?

MR. MILNE: None, your Honor.

THE COURT: All right. Let's see. The procedure of the Court with regard to jury interrogatories is that you are all -- at least one attorney for each party is required to be available by telephone. Gertie or John will call you in the event of any questions. I will get you all on the phone and we'll deal with those by a conference call. I won't answer any questions without conferring with you unless it's something pretty minor.

I assume everybody's agreeable that if they ask for equipment to -- let's see. We've got a couple disks in there and a CD. If they need viewing equipment, I take it nobody has any problem providing that. We'll get them what they need for that.

MR. SCHUTZ: No objection from the plaintiff.

THE COURT: Okay. We'll make sure they get that and we'll note everything that happens, but anything that requires any matter of substance we would be in touch with you on.

You need to also meet as soon as we adjourn here shortly with John and Gertie to make sure that the exhibits conform to with what you think is going in.

All right. Mr. Schutz has spoken of his mother as being a guiding influence in the trial. For me at least in this regard, trying cases, it was my father, who was a trial attorney in rural Minnesota. My father over the years developed a great friendship and sense of the profession from his favorite judge, and his favorite judge after every long trial invited counsel back to his chambers for brandy and cigars.

(Laughter)

THE COURT: As you might guess, it's not exactly my style to serve cigars and brandy, but I invite all members of the trial team back to my chambers for cookies and milk.

(Laughter)

THE COURT: And we will have them available when you finish your exhibit review with John.

Court is in recess.

(Recess at 2:47 p.m.)

* * * * *

(5:03 p.m.)

IN OPEN COURT

(No counsel or parties present)

(Jury enters)

THE COURT: I need to tell you a bedtime story before I send you home. Please be seated.

Members of the jury, I understand through the court security officer that you have elected to go home and resume your deliberations tomorrow morning. Have you gotten as far as electing a presiding juror?

Ms. Weis. Ms. Weis, what time would you like to have the jury proceed with their deliberations tomorrow morning?

(Laughter)

THE COURT: Eleven o'clock doesn't work.

A JUROR: Right around noonish.

JUROR WEIS: I'm here at 8. All right. Nine o'clock.

(Jurors confer)

JUROR WEIS: 9:30.

THE COURT: That's often wise for us, because the traffic usually works better from all directions at 9:30. So I'm going to adjourn your deliberations until tomorrow morning at 9:30.

During the course of this adjournment now, obviously you've started to talk about the case, so it's important that you not discuss this case with anyone at home, particularly the nature of your deliberations, and you must not permit anyone to discuss it with you, and you should not undertake any investigations personally or by others to resolve any question that might have arisen during the course of your deliberation.

It's really important that you only have discussions when all 12 of you are present, so there can't be any subcaucuses or meetings. So you should not discuss the case until all 12 of you are present tomorrow. So you need to come in and check in downstairs and then they'll bring you up when all 12 of you are together and you should make sure that you again don't discuss the case until all 12 of you are present.

And again I want to caution you, don't get on the Internet and check your credit score or anything, no contact or attempt to research this in any way, shape or form.

Other than that, I think we will see you tomorrow

and you may be adjourned until tomorrow morning at 9:30. Meet downstairs, they'll bring you up and you can go from there. We'll leave everything just as it is in the jury room, so your notes and everything are safe in there.

Okay? See you tomorrow.

(Jury excused)

(Proceedings concluded for the day at 5:06 p.m.)

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I N D E X

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C E R T I F I C A T E

We, **TIMOTHY J. WILLETTE** and **KRISTINE MOUSSEAU**, Official Court Reporters for the United States District Court, do hereby certify that the foregoing pages are a true and accurate transcription of our shorthand notes, taken in the aforementioned matter, to the best of our skill and ability.

/s/ Timothy J. Willette

TIMOTHY J. WILLETTE, RDR, CRR, CBC, CCP

/s/ Kristine Mousseau

KRISTINE MOUSSEAU, RPR, CRR

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